No. 15-1204

Title:	David Jennings, et al., Petitioners v. Alejandro Rodriguez, et al., Individually and on Behalf of All Others Similarly Situated
Docketed:	March 28, 2016
Linked with 15A747	
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(13-56706, 13-56755)
Decision Date:	October 28, 2015

Questions Presented

---Date---	------Proceedings and Orders----------
Jan 15 2016	Application (15A747) to extend the time to file a petition for a writ of certiorari from January 26, 2016 to February 25, 2016, submitted to Justice Kennedy.
Jan 21 2016	Application (15A747) granted by Justice Kennedy extending the time to file until February 25, 2016.
Feb 12 2016	Application (15A747) to extend further the time from February 25, 2016 to March 26, 2016, submitted to Justice Kennedy.
Feb 16 2016	Application (15A747) granted by Justice Kennedy extending the time to file until March 26, 2016.
Mar 25 2016	Petition for a writ of certiorari filed. (Response due April 27, 2016)
Apr 18 2016	Order extending time to file response to petition to and including May 24, 2016.
May 10 2016	Brief of respondents Alejandro Rodriguez, et al. in opposition filed.
May 24 2016	DISTRIBUTED for Conference of June 9, 2016.
May 24 2016	Reply of petitioners David Jennings, et al. filed. (Distributed)
Jun 13 2016	DISTRIBUTED for Conference of June 16, 2016.
Jun 20 2016	Petition GRANTED.
Jul 27 2016	The time to file the joint appendix and petitioners' brief on the merits is extended to and including August 26, 2016.
Jul 27 2016	The time to file respondents' brief on the merits is extended to and including October 17, 2016.
Aug 26 2016	Joint appendix filed.
Aug 26 2016	Brief of petitioners David Jennings, et al. filed.
Aug 26 2016	Copies of letter referenced in footnote 10 of petitioners' brief on the merits submitted.
Oct 3 2016	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondents.
Oct 7 2016	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, from counsel for petitioners.
Oct 17 2016	Brief of respondents Alejandro Rodriguez, et al. filed.
Oct 17 2016	Response to petitioner's letter of 8/26/16 submitted.
Oct 21 2016	SET FOR ARGUMENT on Wednesday, November 30, 2016

Oct 24 2016	Brief amici curiae of Members of Asian Americans Advancing Justice filed.
Oct 24 2016	Brief amici curiae of National Immigration Project of the National Lawyers Guild, and the Immigrant Legal Resource Center filed.
Oct 24 2016	Brief amici curiae of American Immigration Council, and American Immigration Lawyers Association filed.
Oct 24 2016	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Oct 24 2016	Brief amici curiae of Detained Legal Services Providers filed.
Oct 24 2016	Brief amici curiae of 43 Social Science Researchers and Professors filed.
Oct 24 2016	Brief amici curiae of Professors of Constitutional, Immigration, and Administrative Law filed. (Distributed)
Oct 24 2016	Brief amici curiae of Human Rights First, and International Law Scholars William Aceves, et al. filed. (Distributed)
Oct 24 2016	Brief amici curiae of Americans for Immigrant Justice, et al. filed. (Distributed)
Oct 24 2016	Brief amici curiae of Nine Retired Immigration Judges, and Board of Immigration Appeals Members filed. (Distributed)
Oct 24 2016	Brief amicus curiae of United Nations High Commissioner for Refugees filed. (Distributed)
Oct 24 2016	Brief amicus curiae of American Bar Association filed. (Distributed)
Oct 26 2016	CIRCULATED.
Nov 1 2016	Record requested from the U.S.C.A. 9th Circuit.
Nov 3 2016	Record received from U.S.C.A. 9th Circuit is electronic and located on PACER. Sealed records also received is electronic.
Nov 16 2016	Reply of petitioners David Jennings, et al. filed. (Distributed)
Nov 30 2016	Argued. For petitioners: Ian H. Gershengorn, Acting Solicitor General, Department of Justice, Washington, D. C. For respondents: Ahilan T. Arulanantham, Los Angeles, Cal.
Dec 15 2016	The parties are directed to file supplemental briefs addressing the following questions: 1) Whether the Constitution requires that aliens seeking admission to the United States who are subject to mandatory detention under 8 U.S.C. 1225(b) must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months. 2) Whether the Constitution requires that criminal or terrorist aliens who are subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months. 3) Whether the Constitution requires that, in bond hearings for aliens detained for six months under Sections 1225(b), 1226(c), or 1226(a), the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community, whether the length of the alien's detention must be weighed in favor of release, and whether new bond hearings must be afforded automatically every six months. The briefs are to be filed simultaneously with the Clerk and served upon opposing counsel on or before 2 p.m., Tuesday, January 17, 2017. Amicus briefs may be filed with the Clerk and served upon counsel on or before 2 p.m., Friday, January 27, 2017. Reply briefs are to be filed simultaneously with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, February 6, 2017. The word limits and cover colors for the briefs should correspond to the provisions of Rule 33.1(g) pertaining to briefs on the merits rather than to the provision pertaining to supplemental briefs. .
Dec 21 2016	The time for the parties to file their supplemental briefs is extended to and including 2 p.m., Tuesday, January 31, 2017. Amicus briefs may be filed on or before 2 p.m., Friday, February 10, 2017. Reply briefs are to be filed on or before 2 p.m., Tuesday, February 21, 2017.
Jan 31 2017	Supplemental brief of petitioners David Jennings, et al. filed. (Distributed)
Jan 31 2017	Supplemental brief of respondents Alejandro Rodriguez, et al. filed. (Distributed)
Feb 10 2017	Brief amici curiae of 29 U.S. Representatives: Chairman Robert Goodlatte, et al. in support of petitioners filed. (Distributed)

Feb 10 2017	Brief amici curiae of National Immigration Project of the National Lawyers Guild, et al. in support of respondents filed. (Distributed)
Feb 10 2017	Brief amici curiae of Americans for Immigrant Justice, et al. in support of respondents filed. (Distributed)
Feb 10 2017	Brief amici curiae of Professors Stephen H. Legomsky and Stephen Yale-Loehr in support of respondents filed. (Distributed)
Feb 10 2017	Brief amicus curiae of American Bar Association in support of respondents filed. (Distributed)
Feb 10 2017	Brief amici curiae of States of California, et al. in support of respondents filed. (Distributed)
Feb 10 2017	Brief amici curiae of County of Santa Clara California, and 19 additional counties, et al. in support of respondents filed. (Distributed)
Feb 10 2017	Brief amicus curiae of Human Rights First in support of respondents (To Be Recovered) filed. (Distributed)
Feb 10 2017	Brief amicus curiae in support of petitioners of Eagle Forum Education & Legal Defense Fund filed. (Distributed)
Feb 21 2017	Supplemental reply brief of respondents Alejandro Rodriguez, et al. filed. (Distributed)
Feb 21 2017	Supplemental reply brief of petitioners David Jennings, et al. filed. (Distributed)
Mar 2 2017	Letter received from Counsel for Respondents (Distributed)
Jun 26 2017	This case is restored to the calendar for reargument.

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15-1204

No.

In the Supreme Court of the United States

DAVID JENNINGS, ET AL., PETITIONERS

v.

ALEJANDRO RODRIGUEZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under 8 U.S.C. 1225(b), inadmissible aliens who arrive at our Nation's borders must be detained, without a bond hearing, during proceedings to remove them from the country. Under 8 U.S.C. 1226(c), certain criminal and terrorist aliens must be detained, without a bond hearing, during removal proceedings. Under 8 U.S.C. 1226(a), other aliens may be released on bond during their removal proceedings, if the alien demonstrates that he is not a flight risk or a danger to the community. 8 C.F.R. 236.1(c)(8). Aliens detained under Section 1226(a) may receive additional bond hearings if circumstances have changed materially. 8 C.F.R. 1003.19(e). The questions presented are:

1. Whether aliens seeking admission to the United States who are subject to mandatory detention under Section 1225(b) must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months.

2. Whether criminal or terrorist aliens who are subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months.

3. Whether, in bond hearings for aliens detained for six months under Sections 1225(b), 1226(c), or 1226(a), the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community; whether the length of the alien's detention must be weighed in favor of release; and whether new bond hearings must be afforded automatically every six months.

PARTIES TO THE PROCEEDING

Petitioners were appellants and cross-appellees in the court of appeals. They are: David Jennings, in his official capacity as the Field Office Director of the Los Angeles District of Immigration and Customs Enforcement (ICE); Jeh Johnson, in his official capacity as the Secretary of Homeland Security; Loretta E. Lynch, in her official capacity as the Attorney General of the United States; Gabriel Valdez, in his official capacity as the Assistant Field Office Director of the Los Angeles District of ICE; Rodney Penner, in his official capacity as the Captain of Mira Loma Detention Center; Sandra Hutchens, in her official capacity as Sheriff of Orange County; Officer Arturo Trevino, in his official capacity as the Officer-in-Charge of the Theo Lacy Facility; Captain Davis Nighswonger, in his official capacity as Commander of the Theo Lacy Facility; Captain Mike Kreuger, in his official capacity as Operations Manager, James A. Musick Facility; Arthur Edwards, in his official capacity as Officer-in-Charge, Santa Ana City Jail; Russell Davis, in his official capacity as Jail Administrator, Santa Ana City Jail; Juan P. Osuna, in his official capacity as Director, Executive Office for Immigration Review.*

Respondents were appellees and cross-appellants in the court of appeals. They are Alejandro Rodriguez, Abdirizak Aden Farah, Jose Farias Cornejo, Yussuf Abdikadir, and Abel Perez Ruelas, for themselves and on behalf of a class of similarly situated individuals.

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* David Jennings, Gabriel Valdez, and Officer Arturo Trevino, are substituted for their predecessors, Timothy Robbins, Wesley Lee, and Officer Nguyen. See S. Ct. Rule 35.3.

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In the Supreme Court of the United States

No.

DAVID JENNINGS, ET AL., PETITIONERS

v.

ALEJANDRO RODRIGUEZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the federal parties, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-59a) is reported at 804 F.3d 1060. An earlier opinion of the court of appeals affirming a preliminary injunction (App., *infra*, 60a-100a) is reported at 715 F.3d 1127. An opinion of the court of appeals reversing the denial of class certification (App., *infra*, 101a-138a) is reported at 591 F.3d 1105. The permanent injunction order of the district court (App., *infra*, 139a-148a) is not published in the *Federal Supplement* but is available at 2013 WL 5229795.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 2015. On January 21, 2016, Justice

Kennedy extended the time within which to file a petition for a writ of certiorari to and including February 25, 2016. On February 16, 2016, Justice Kennedy further extended the time to March 26, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced in the appendix to this petition. App., *infra*, 149a-164a.

STATEMENT

A. Legal Framework

This Court has "long recognized [that] the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)); see *Arizona* v. *United States*, 132 S. Ct. 2492, 2498 (2012). Pursuant to that power, Congress has enacted a multifaceted framework governing detention of aliens by the Department of Homeland Security (DHS) during proceedings to determine whether they should be excluded or removed from this country. Three provisions are relevant here: 8 U.S.C. 1225(b) governs detention of aliens who arrive at our Nation's borders; 8 U.S.C. 1226(c) governs detention of certain criminal and terrorist aliens; and 8 U.S.C. 1226(a) governs detention of other aliens who are already present in this country.

1. Detention of inadmissible aliens who are seeking admission to the United States is generally mandatory during their removal proceedings. See 1 Charles R. Gordon et al., *Immigration Law and Procedure* § 8.09[1] (2015). Congress has provided that "[a]ll" applicants for admission "shall be inspected by immigration officers." 8 U.S.C. 1225(a)(3). When a DHS immigration officer determines that an alien "who is arriving in the United States" lacks travel documents or is attempting to enter through fraud or misrepresentation, the officer generally "shall order the alien removed from the United States without further hearing," a process known as expedited removal. 8 U.S.C. 1225(b)(1)(A)(i); see 8 U.S.C. 1182(a)(6)(C) and (7); see also 8 U.S.C. 1225(b)(1)(A)(iii) (certain additional aliens, who recently arrived, may be designated for expedited removal); 69 Fed. Reg. 48,880 (Aug. 11, 2004) (same). If the alien indicates an intention to apply for asylum or asserts a fear of persecution, a DHS asylum officer must determine whether the alien has a credible fear. 8 U.S.C. 1225(b)(1)(A)(ii) and (B); 8 C.F.R. 208.30, 235.3(b)(4). The alien "shall be detained pending a final determination of credible fear of persecution." 8 U.S.C. 1225(b)(1)(B)(iii)(IV). If the alien lacks (or never asserts) a credible fear, he "shall be detained" until removed. *Ibid.* If he has a credible fear, he "shall be detained for further consideration of the application for asylum." 8 U.S.C. 1225(b)(1)(B)(ii).

Furthermore, if an immigration officer determines that an "applicant for admission" who is "seeking admission" is not subject to expedited removal but is "not clearly and beyond a doubt entitled to be admitted," the alien "shall be detained" for removal proceedings instituted before an immigration judge in the

Department of Justice. 8 U.S.C. 1225(b)(2)(A), 1229a. As part of those removal proceedings, the alien may seek asylum or various other forms of protection. *E.g.*, 8 U.S.C. 1158(a)(1).

Aliens detained under Section 1225(b) may be released into the interior of the United States during their removal proceedings only through the exercise of the Secretary of Homeland Security's discretionary parole authority. The Secretary "may," "in his discretion" and under statutory criteria, "parole into the United States temporarily" an applicant for admission. 8 U.S.C. 1182(d)(5)(A) and (B). Parole is committed to the Secretary's discretion, see *ibid.*, and DHS regulations and directives guide its exercise for aliens detained under Section 1225(b). See 8 C.F.R. 212.5(b), 235.3(b)(2)(iii), (b)(4), and (c); see also U.S. Immigration and Customs Enforcement, *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture*, Directive No. 11002.1 (Dec. 8, 2009) (parole guidelines for arriving aliens with a credible fear of persecution).[1] Because the release of such aliens is governed by the Secretary's parole authority, immigration judges "may not" hold hearings to determine whether an arriving alien should be released on bond during removal proceedings. 8 C.F.R. 1003.19(h)(2)(i)(B).

2. Section 1226(c) mandates detention of certain criminal and terrorist aliens in removal proceedings. It directs that DHS "shall take into custody" aliens who are convicted of certain crimes or have engaged in certain terrorist activities. 8 U.S.C. 1226(c)(1). An alien detained under Section 1226(c) is given notice of

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[1] https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf.

and an opportunity to challenge the basis for that classification before an immigration judge. See 8 C.F.R. 1003.19(h)(2)(ii); *In re Joseph*, 22 I. & N. Dec. 799 (B.I.A. 1999). If Section 1226(c) applies, the Secretary "may release" such an alien during his removal proceedings "only if" release is "necessary" for witness-protection purposes and "the alien satisfies the [Secretary]" that he "will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." 8 U.S.C. 1226(c)(2). This Court sustained Section 1226(c)'s mandatory detention requirement against a due process challenge in *Demore* v. *Kim*, 538 U.S. 510 (2003).

3. Section 1226(a) otherwise generally governs the detention of aliens who are present in the United States and are in removal proceedings. Section 1226(a) provides that aliens "may" be detained during removal proceedings, and that the Secretary "may release" such aliens on bond or conditional parole. 8 U.S.C. 1226(a)(2)(A).

DHS regulations provide that a DHS immigration officer "may, in [his] discretion," release an alien detained under Section 1226(a) on bond if the alien "demonstrate[s] to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding." 8 C.F.R. 236.1(c)(8). An alien in turn may, "at any time" during removal proceedings, ask an immigration judge for a redetermination of his bond. *Reno* v. *Flores*, 507 U.S. 292, 309 (1993); see 8 C.F.R. 236.1(d)(1), 1236.1(d)(1). At that bond hearing, the burden is on the alien to demonstrate that he does not present a flight risk or danger. *Ibid.*; see *In re*

Guerra, 24 I. & N. Dec. 37, 40 (B.I.A. 2006); *In re Adeniji*, 22 I. & N. Dec. 1102, 1111-1113 (B.I.A. 1999).

The alien may appeal the immigration judge's decision regarding bond to the Board of Immigration Appeals (BIA). 8 C.F.R. 236.1(d)(3)(i). An alien also may, at any time, ask an immigration judge to redetermine his bond, by "showing that [his] circumstances have changed materially since the prior bond redetermination." 8 C.F.R. 1003.19(e); see *In re Uluocha*, 20 I. & N. Dec. 133, 134 (B.I.A. 1989) (an alien "is not limited to only one bond reduction request").

B. Facts And Procedural History

In May 2007, respondents initiated this habeas corpus class action on behalf of themselves and other aliens in removal proceedings who are detained by DHS in the Central District of California. App., *infra*, 4a. Respondents contended that class members are entitled to bond hearings before an immigration judge once they have been detained for longer than six months. The district court initially declined to certify a class, but the Ninth Circuit reversed. *Ibid.*; see *id.* at 101a-138a. On remand, the district court certified a class of all aliens within that district who are detained for "longer t an six months" during ongoing removal proceedings, are not detained pursuant to a national security detention statute, 8 U.S.C. 1226a, 1531-1537, and have not been afforded a bond hearing. App., *infra*, 5a. The court also divided the class into subclasses, corresponding to the statutes under which class members are detained: 8 U.S.C. 1225(b), 1226(c), and 1226(a).[2]

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[2] The district court created a subclass for class members detained under 8 U.S.C. 1231(a), which governs detention of aliens

The district court entered a preliminary injunction. App., *infra*, 147a-148a. It required DHS to provide bond hearings to aliens detained for six months under Section 1225(b), as well as criminal aliens detained for six months under Section 1226(c). *Ibid.*; see *id.* at 6a. The Ninth Circuit affirmed the preliminary injunction. *Id.* at 6a.; see *id.* at 60a-100a.

The district court then granted summary judgment to respondents and entered a permanent injunction. App., *infra*, 139a-148a. The permanent injunction requires DHS to provide any class member who is detained for six months or more with a bond hearing before an immigration judge. *Id.* at 3a-4a; see *id.* at 144a. It further requires those bond hearings to satisfy certain procedural requirements, including that "[t]he government must prove by clear and convincing evidence that a detainee is a flight risk or a danger to the community to justify the denial of bond." *Id.* at 142a. The injunction the district court entered did not direct immigration judges to modify the factors they consider in bond hearings, or mandate that bond hearings be provided automatically every six months. See *id.* at 143a-145a.

The court of appeals affirmed in part and reversed in part. App., *infra*, 1a-59a. In affirming, the court did not attempt to square the requirement of bond hearings at the six-month mark with the text of Sections 1225(b), 1226(c), 1226(a), or any relevant regulation. The court instead relied solely on the canon of

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against whom a final order of removal has been entered. See *Zadvydas* v. *Davis*, 533 U.S. 678, 682 (2001). The court of appeals held that this subclass "does not exist" because aliens detained under Section 1231(a) are no longer in ongoing removal proceedings. App., *infra*, 51a.

constitutional avoidance, reasoning that "prolonged" detention under any of those statutes would give rise to serious constitutional doubt, that Congress would have wanted to avoid these doubts by implicitly limiting detention without bond to a "reasonable time," and concluding that detention becomes unreasonable "at the six-month mark." *Id.* at 13a; see *id.* at 32a-35a (discussing Section 1226(c)); *id.* at 39a-45a (Section 1225(b)); *id.* at 46a-48a (Section 1226(a)).

The court of appeals also revised the procedures applicable in a bond hearing. Whereas 8 C.F.R. 1003.19(e) provides that aliens who have already had one bond hearing may obtain another hearing if they show that circumstances have changed materially, the court of appeals concluded that all class members—including aliens detained for more than six months after a prior bond hearing under Section 1226(a)—"are entitled to automatic bond hearings after six months of detention." App., *infra*, 48a. The court further concluded that, in all *Rodriguez* bond hearings, the alien is entitled to be released unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or danger to the community. *Id.* at 49a-50a; see *Singh* v. *Holder*, 638 F.3d 1196, 1203-1204 (9th Cir. 2011).

The court of appeals reversed the district court's decision not to revise the factors immigration judges must consider in bond hearings. App., *infra*, 56a-57a. The court of appeals held that immigration judges "must consider" as a factor "the length of time for which a noncitizen has already been detained." *Ibid.* And the court of appeals held that "the government must provide periodic bond hearings every six months." *Id.* at 57a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision is fundamentally wrong in numerous respects and conflicts with decisions of this Court and other courts of appeals. Review by this Court is warranted.

The Ninth Circuit has rewritten the statutory and regulatory framework governing detention of aliens in removal proceedings. It has replaced Congress's carefully tailored statutory regime with a rigid, one-size-fits-all rule that every alien in detention during ongoing removal proceedings—including inadmissible aliens arriving for the first time at our Nation's borders and criminals or terrorists who are in mandatory detention under Section 1226(c)—must receive a bond hearing automatically after six months, and with it the prospect of release into the United States. The court of appeals then went even further and rewrote the procedures that apply in bond hearings. Federal regulations unambiguously provide that, even when an alien is detained under Section 1226(a) and thus may obtain bond, "the alien" must demonstrate that he is *not* a flight risk or a danger to the community, and may obtain a new bond hearing only by showing a material change in circumstances. 8 C.F.R. 236.1(c)(8), 1003.19(e). The court has turned that scheme on its head, requiring the *government* to prove—*by clear and convincing evidence*—that the alien is a flight risk or a danger to the community, and requiring such bond hearings to occur automatically every six months, no matter what. And the court imposed those requirements on the detention of aliens under 8 U.S.C. 1225(b) and 1226(c), even though those statutory provisions and implementing regulations do not provide for bond hearings *at all*.

The court of appeals' wholesale revision of the law governing detention of aliens during removal proceedings oversteps the proper judicial role and has no basis in the underlying statutes and regulations. It conflicts with this Court's longstanding rule that the political Branches of the federal government have plenary control over which aliens may physically enter the United States and under what circumstances. See *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). It conflicts with this Court's holding in *Demore* v. *Kim*, 538 U.S. 510 (2003), that it is constitutional to detain criminal or terrorist aliens under Section 1226(c), without bond hearings, during removal proceedings. *Id.* at 531. Indeed, the alien in *Demore* was detained "for six months." *Ibid.* And it conflicts with decisions of other courts of appeals regarding whether Section 1226(c) authorizes detention of criminal and terrorist aliens, without a bond hearing and the prospect of release, for more than six months.

The court of appeals' rulings have serious practical repercussions. The court's rulings are contrary to the political Branch's judgments regarding the need for the detention of arriving aliens and criminal and terrorist aliens. In addition, the court's requirement of automatic bond hearings by the six-month mark creates a powerful incentive for aliens subject to mandatory detention under Sections 1225(b) and 1226(c) to delay their removal proceedings in order to obtain a bond hearing—and possible release—that they otherwise could not receive. And the court's shifting and heightening of the burden of proof represents a radical departure from regulations that have governed such hearings for decades.

The consequences are particularly vivid for inadmissible aliens who are arriving at our borders for the first time, and who are subject to mandatory detention under Section 1225(b). As a practical matter, DHS would often be unable to demonstrate by clear and convincing evidence that such a person is a flight risk or danger: DHS often knows little or nothing about such a person beyond the fact that he or she has arrived and lacks valid documentation. The court's legal rule thus creates an incentive for people to make a potentially life-threatening trip to this country, to abuse our legal process to obtain entry into the United States, and then to disappear rather than appear at any removal proceedings.

The Ninth Circuit's decision also impedes DHS's efforts to pursue its highest enforcement priorities, which include securing the border and removing serious criminals. The court of appeals' categorical six-month rule hinders DHS's pursuit of its mission by taking control of the border out of DHS's hands and preventing DHS from detaining criminal aliens for the time necessary to secure their removal. This Court should grant certiorari and reverse.

I. THE COURT OF APPEALS' DECISION IS WRONG

The court of appeals plainly erred in rewriting a series of federal immigration laws and regulations. It erred in imposing a regime of bond hearings by the six-month mark for aliens detained under Section 1225(b); it erred in imposing the same rigid regime for criminal and terrorist aliens detained under Section 1226(c); and it erred in rewriting the procedures that apply in all bond hearings, including for aliens detained under Section 1226(a) who have already had bond hearings.

A. Section 1225(b) Does Not Impose A Six-Month Limit On Mandatory Detention Of Aliens

1. Mandatory detention under Section 1225(b) is not limited to six months. This Court has "long recognized [that] the power to expel or exclude aliens [i]s a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (quoting *Mezei*, 345 U.S. at 210). "[T]he Court's general reaffirmations of this principle have been legion." *Kleindienst* v. *Mandel*, 408 U.S. 753, 765-766 & n.6 (1972) (collecting cases). "Proceedings to exclude or expel would be in vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation." *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896); *e.g.*, *Reno* v. *Flores*, 507 U.S. 292, 308 (1993).

The authority of the political Branches is particularly strong—and countervailing constitutional interests are particularly faint—with respect to control of the Nation's borders as to aliens who stand "on the threshold of initial entry." *Mezei*, 345 U.S. at 212; see *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) ("[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."). For such aliens at the threshold, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Mezei*, 345 U.S. at 212 (quoting *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950)).

In *Mezei*, for example, this Court upheld the indefinite detention of a lawful permanent resident alien at the border for 21 months, without any kind of hearing, as he sought to return to the United States after a nearly two-year trip abroad. 345 U.S. at 207. This Court squarely rejected the proposition that his "continued exclusion deprives him of any statutory or constitutional right," *id.* at 215, and distinguished *Mezei*'s "clear break" in "continuous residence" from a mere "temporary absence," where some kind of hearing may be required for a lawful permanent resident. *Id.* at 213-214. *Mezei* drew spirited dissents, but the dissenters did not dispute that the alien could be held, without bond, during the period needed to effectuate his exclusion. Rather, they disagreed with the government's decision, on national security grounds, not to provide Mezei notice of or opportunity to challenge the basis for his exclusion. See *id.* at 218 (Black, J., dissenting) (calling for "a fair open court hearing in which evidence is appraised by the court"); *id.* at 227 (Jackson, J., dissenting) (Mezei should "be informed of [the] grounds [for detention] and have a fair chance to overcome them").

Consistent with this long and unbroken legal tradition, Congress has provided that an inadmissible alien arriving in or seeking admission to the United States "shall be detained" during proceedings to remove the alien from the country. 8 U.S.C. 1225(b)(1)(B)(ii), (iii)(IV), and (b)(2). An immigration judge "may not" hold a hearing to determine whether an arriving alien in removal proceedings should be released on bond. 8 C.F.R. 1003.19(h)(2)(i)(B). Congress has instead vested the Secretary with discretion to decide whether to release the alien on parole. 8 U.S.C. 1182(d)(5); see 8

C.F.R. 235.3(c). As a result, the Executive retains plenary control over the border and physical entry of aliens into the interior. But aliens in such detention have notice of and an opportunity to dispute the basis for their exclusions: aliens detained under Section 1225(b)(1) who establish a credible fear, and aliens detained under Section 1225(b)(2), are entitled to full removal proceedings before an immigration judge.

2. The court of appeals nonetheless held (App., *infra*, 36a-43a) that every alien detained during removal proceedings under Section 1225(b) must be given a bond hearing before an immigration judge—with the possibility of release into the interior over DHS's objection—if detention lasts for six months. The court did not even attempt to square its interpretation with the statutory text. Instead, the court rested its holding exclusively on the canon of constitutional avoidance. See *id.* at 39a-45a. The court's decision is wrong and conflicts with the long-established principle, embodied in Section 1225(b) and confirmed by *Mezei*, that the political Branches have plenary control over protection of our Nation's borders.

At the outset, the court's ruling flouts Section 1225(b)'s plain text. The canon of constitutional avoidance is "'a tool for choosing between competing plausible interpretations of a provision'"; "[i]t 'has no application' in the interpretation of an unambiguous statute." *McFadden* v. *United States*, 135 S. Ct. 2298, 2307 (2015) (quoting *Warger* v. *Shauers*, 135 S. Ct. 521, 529 (2014)). Here, Congress has made it clear that aliens covered by Section 1225(b) "shall be detained" during removal proceedings, whether expedited or ordinary. 8 U.S.C. 1225(b)(1)(B)(ii), (iii)(IV), and (2)(A). The mandatory "shall" in Section 1225(b)

contrasts with the discretionary "may" in Section 1226(a), which allows for bond hearings before an immigration judge. 8 U.S.C. 1226(a)(2)(A). And nothing in Section 1225(b) can be read to suggest a time limit on mandatory detention during removal proceedings—much less a rigid six-month cap. Detention under Section 1225(b) ends when removal proceedings end. In the meantime, parole is the exclusive mechanism for releasing aliens into the interior—and parole is committed to the Secretary's unreviewable discretion. See 8 U.S.C. 1182(d)(5).

The court of appeals was also wrong to suggest that the Executive's plenary control of the border with respect to aliens on the threshold of entry presents serious constitutional problems that Congress would have wanted to avoid. Indeed, the court itself recognized (App., *infra*, 41a) that Section 1225(b) is clearly valid as applied to any alien seeking initial entry—and that this is "likely the vast majority" of class members. *Id.* at 86a. The court nonetheless invoked constitutional avoidance to require bond hearings at the six-month mark for *every* alien detained under Section 1225(b), solely because of the possibility that a lawful permanent resident returning from abroad *could* be detained as an "arriving alien" for more than six months. See *id.* at 43a ("The question * * * is whether 'one possible application of [a] statute raises constitutional concerns.'" (citation omitted)); *id.* at 86a (same).

The court of appeals' reasoning is deeply flawed. In the first place, Mezei himself was a lawful permanent resident returning from an extended trip abroad, yet this Court sustained his detention. *Mezei*, 345 U.S. at 214-216. The possibility that the statute

might be applied to a lawful permanent resident thus furnished no basis for the court of appeals to impose a categorical six-month limit on mandatory detention for all aliens detained under Section 1225(b).

Indeed, respondents have not identified a single class member who is a lawful permanent resident detained for six months under Section 1225(b). App., *infra*, 40a. In fact, lawful permanent residents should never be detained under Section 1225(b)(1). Federal regulations provide that a verified lawful permanent resident "shall not" be detained under that provision, 8 C.F.R. 235.3(b)(5)(ii), and if a lawful permanent resident is detained by mistake he or she can challenge that through appeal or habeas corpus. 8 U.S.C. 1225(b)(1)(C), 1252(e)(2)(C); 8 C.F.R. 235.6(a)(2)(ii). And lawful permanent residents should rarely be detained for six months under Section 1225(b)(2), which covers "applicant[s] for admission" who are seeking admission to the country. 8 U.S.C. 1225(b)(2). Congress has provided that lawful permanent residents generally "shall not be regarded" as applicants for admission. 8 U.S.C. 1101(a)(13)(C). A lawful permanent resident is an applicant for admission only if the government proves, by clear and convincing evidence, that he has been outside the country for more than 180 continuous days; "abandoned or relinquished" his lawful status; "engaged in illegal activity after having departed the United States"; departed the country during removal proceedings; has committed a criminal offense serious enough to render him inadmissible; or attempted to enter outside a designated port of entry. *Ibid.*; see *In re Rivens*, 25 I. & N. Dec. 623, 625 (B.I.A. 2011).

Congress has thus plainly provided that a lawful permanent resident who seeks to enter following travel abroad under these narrow circumstances faces "denial of reentry" and treatment as a new entrant who must seek admission. *Vartelas* v. *Holder*, 132 S. Ct. 1479, 1484-1485 (2012). Congress's judgment that a lawful permanent resident should be "assimilate[d] to th[e] status" of a new entrant in these circumstances, and thus may be detained on the authority of *Mezei*, 345 U.S. at 214, warrants great deference. And in the rare situation in which a lawful permanent resident is detained under Section 1225(b)(2) for six months, he would be in ongoing removal proceedings and thus would have the procedural protections available in those proceedings, which was the subject of the dissenters' concerns in *Mezei*.

The court of appeals thus applied the canon of constitutional avoidance to avoid an issue that would rarely occur and on which Congress would be entitled to great deference, to carve a massive loophole into a statute that the court itself recognized was constitutional in every actual application thus far in this case, and to break sharply from this Court's longstanding rule that the Executive has plenary authority under the immigration laws to control the border as to aliens standing on the threshold of entry. The result is a windfall for every class member who has actually been detained for six months under Section 1225(b), who after six months gains the possibility of entering this country's interior over DHS's objection.

To be faithful to the statutory text, Congress's intent, and this Court's longstanding precedent, Section 1225(b) must be applied as written. If the situation arises in which a lawful permanent resident is de-

tained for a prolonged period under Section 1225(b)(2) in a way that *Mezei* does not squarely control, that the Secretary does not address through the exercise of his parole authority, and that raises a constitutional issue, that case would be properly resolved in an as-applied challenge under the Due Process Clause, taking into account the unusual circumstances of that particular case.

3. The court of appeals' requirement that aliens detained under Section 1225(b) receive a bond hearing by the six-month mark is not only profoundly wrong, it also creates perverse incentives for aliens to delay their removal proceedings. Under the court of appeals' rigid six-month rule, an alien can achieve a windfall through dilatory and obstructive tactics: As long as detention lasts for six months—even when the delay is due to the alien's own actions—the alien obtains a bond hearing, and with it the possibility of release into the United States.

Aliens desiring to do so will often be able to ensure that their removal proceedings last for six months. An immigration judge will grant a continuance to an alien in removal proceedings "for good cause shown." 8 C.F.R. 1003.29. Moreover, the Ninth Circuit has repeatedly required immigration judges to grant multiple continuances to aliens, which can last months at a time. *E.g.*, *Montes-Lopez* v. *Holder*, 694 F.3d 1085, 1087 (2012) (reversing denial of third continuance, where immigration judge "warned" that the second "would be [the] last"); *Ahmed* v. *Holder*, 569 F.3d 1009, 1012 (2009) (collecting cases and reversing denial of a second six-month continuance); *Martinez-Guzman* v. *Holder*, 356 Fed. Appx. 985, 987 (2009) (reversing denial of a motion for a fifth continuance;

government failed to identify a "specific inconvenience"); *Ordonez-Garay* v. *Mukasey*, 290 Fed. Appx. 988, 990 (2008) ("A motion for a continuance * * * cannot be denied solely on the basis of expediency.").

Shifting the burden of proof to DHS and imposing the heightened standard of proof by clear-and-convincing evidence make the practical problem much worse. Under the court of appeals' ruling, an alien detained under Section 1225(b) would be able to enter the interior if his removal proceedings last for six months, unless DHS can demonstrate by clear and convincing evidence that the alien is a flight risk or a danger. App., *infra*, 3a-4a. But DHS knows little or nothing about many aliens detained under Section 1225(b)—"likely the vast majority" of whom are inadmissible aliens arriving for the first time at our borders, *id.* at 86a—beyond the fact that he or she lacks valid travel documentation or sought admission through fraud. The result is that many aliens would attain something close to a legal entitlement to be released into the interior of the United States—over the objections of DHS—by virtue of an information asymmetry. Congress would never enact such a huge loophole in the Executive's control of our Nation's borders, and it did not do so in Section 1225(b).

B. Section 1226(c) Does Not Impose A Six-Month Limit On Mandatory Detention Of Criminal Or Terrorist Aliens

1. The court of appeals further erred in holding that mandatory detention of criminal and terrorist aliens under Section 1226(c) automatically terminates after six months. Section 1226(c) unambiguously provides that detention of the covered criminal or terrorist aliens is mandatory while removal proceed-

ings are ongoing, 8 U.S.C. 1226(c)(1), and that DHS "may release" such a criminal or terrorist "only if" it is necessary for witness-protection purposes and "the alien satisfies the [Secretary]" that he is not a flight risk or danger to the community. 8 U.S.C. 1226(c)(2).[3] "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) (citation omitted). There is no such evidence of contrary legislative intent here. Section 1226(c) thus unambiguously forecloses the court's addition of a new, unwritten exception allowing release at the six-month mark.

The court of appeals' six-month rule also conflicts with this Court's decision in *Demore*, which rejected a due process challenge to the detention of a lawful permanent resident under Section 1226(c) during his removal proceedings. 538 U.S. at 531. *Demore* leaves no room for the view that Section 1226(c) itself mandates a bond hearing by the six-month mark—or that the detention of a criminal or terrorist alien for six months without a bond hearing gives rise to a serious constitutional problem that Congress implicitly avoided: The alien in *Demore* was himself detained "for six months" without a bond hearing. *Ibid.*

The court of appeals' reliance on *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), to support its imposition of a flat six-month limit on mandatory detention also con-

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[3] The class definition here excludes aliens detained under national-security detention statutes. App., *infra*, 5a-6a; see 8 U.S.C. 1226a and 1531-1537. Terrorists may also be detained under Section 1226(c) itself. *E.g.*, *Hussain* v. *Gonzales*, 492 F. Supp. 2d 1024, 1033 (E.D. Wis. 2007).

flicts with *Demore*. *Demore* itself distinguished *Zadvydas*, explaining that the detention of aliens after entry of a final order of removal is "materially different" from detention during ongoing removal proceedings. *Demore*, 538 U.S. at 527. First, the detention in *Zadvydas* no longer "serve[d] its purported immigration purpose" of effectuating removal, because removal was "no longer practically attainable." *Ibid.* (quoting *Zadvydas*, 533 U.S. at 690). Indeed, other countries had refused to accept the aliens in *Zadvydas*, so there was no country to which to return them. See 533 U.S. at 684, 702. By contrast, the Court in *Demore* concluded, detention of aliens "*pending their removal proceedings* * * * necessarily serves the purpose of preventing [them] from fleeing prior to or during their removal proceedings." 538 U.S. at 527-528. Second, the detention in *Zadvydas* "ha[d] no obvious termination point" and thus was "indefinite" and "potentially permanent." *Id.* at 528-529 (quoting *Zadvydas*, 533 U.S. at 690-691, 697). In contrast, the Court explained, "*detention pending a determination of removability*" has an "obvious termination point": entry of a final order of removal. *Id.* at 529 (quoting *Zadvydas*, 533 U.S. at 697) (emphasis in *Demore*).

To be sure, this Court described the "period necessary for * * * removal proceedings" as "brief," and stated that it ordinarily lasts a "very limited time," pointing to evidence that the average time in proceedings before an immigration judge was 47 days, with an average of four additional months if an alien appealed. *Demore*, 538 U.S. at 513, 529 & n.12. But that does not mean that Congress—without mentioning it—intended to terminate mandatory detention and instead to require bond hearings after six months, or

that detention under Section 1226(c) categorically becomes constitutionally doubtful at that point. This Court sustained the alien's detention for more than "six months" in *Demore*, and noted that he "had requested a continuance of his removal hearing" to obtain documents to assist his defense. *Id.* at 531 & n.15. The Court also recognized that requiring detention during an alien's appeal to the BIA "may deter aliens from exercising their right to do so," but explained that "'the legal system . . . is replete with situations requiring the making of difficult judgments as to which course to follow.'" *Id.* at 530 n.14 (quoting *McGautha* v. *California*, 402 U.S. 183, 213 (1971)).

Under *Demore*, criminal or terrorist aliens detained under Section 1226(c) thus make litigation choices in light of the possibility that seeking continuances, relief from removal, or appellate review will extend the duration of their removal proceedings and thereby extend the period of their detention. The court of appeals' flat six-month limit conflicts with *Demore*'s response to that practical reality, and instead gives criminals and terrorists an incentive to delay and to file appeals they otherwise would not take: they obtain a bond hearing, with a presumptive prospect of release. The Third and Sixth Circuits have rejected the Ninth Circuit's rigid six-month rule in part because of this concern. See *Chavez-Alvarez* v. *Warden York Cnty. Prison*, 783 F.3d 469, 476 (3d Cir. 2015) ("aliens who are merely gaming the system to delay their removal should not be rewarded with a bond hearing that they would not otherwise get under the statute"); *Ly* v. *Hansen*, 351 F.3d 263, 272 (6th Cir. 2003) (cautioning against rewarding aliens who "raise frivolous objections and string out the proceed-

ings"); cf. *Barker* v. *Wingo*, 407 U.S. 514, 522-531 (1972) (rejecting a "rigid" time requirement for what constitutes a speedy trial, and instead requiring balancing of factors, including the reasons for delay and whether it is "attributable to the defendant").

The court of appeals' six-month rule also cannot be squared with Justice Kennedy's concurrence in *Demore*. Justice Kennedy joined the majority opinion but further explained that, in his view, a lawful permanent resident "could be entitled" to a bond hearing "if the continued detention became unreasonable or unjustified." 538 U.S. at 532. Like the majority, however, he viewed reasonableness of continuing detention as depending not on its duration, but on its justification. If there were an "unreasonable delay *by the INS* in pursuing and completing deportation proceedings," he explained, it "could become necessary" to ask whether "the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, *but to incarcerate for other reasons*." *Id.* at 532-533 (emphases added). This rationale forecloses a bright-line six-month cap, whether as a matter of due process or of statutory construction. When delay is caused *by the alien*, for example, the alien's detention continues to be justified by the interests in "protect[ing] against risk of flight or dangerousness." *Ibid.*

2. A requirement that aliens detained under Section 1226(c) must be given bond hearings by the six-month mark also causes the very harms Congress enacted Section 1226(c) to prevent. Congress mandated detention of criminal and terrorist aliens during removal proceedings in reaction to evidence that the prior scheme—under which criminal aliens obtained

bond hearings before immigration judges—led to "wholesale failure." *Demore*, 538 U.S. at 518. One study showed that, "after criminal aliens were identified as deportable, 77% were arrested at least once more and 45%—nearly half—were arrested multiple times before their deportation proceedings even began." *Ibid.* And even when immigration judges concluded that criminal aliens were *not* flight risks and thus could be released on bond, "more than 20% of deportable criminal aliens failed to appear for their removal hearings." *Id.* at 519. "Too often, as one frustrated INS official told [Congress], only the stupid and honest get deported." S. Rep. No. 48, 104th Cong., 1st Sess. 3 (1995). The bottom line was a "serious and growing threat to public safety." *Id.* at 1.

Congress responded by taking the determination of flight risk and danger out of immigration judges' hands. Section 1226(c) instead reflects Congress's categorical judgment that the covered criminal and terrorist aliens are inherently flight risks or dangers to the community, and thus should not be released on bond during the period necessary for their removal proceedings. See *Demore*, 538 U.S. at 518-521; cf. *Flores*, 507 U.S. at 308 (upholding detention of alien minors during removal proceedings). The court of appeals' rule that criminal and terrorist aliens detained under Section 1226(c) *must* be given bond hearings by the six-month mark thus puts immigration judges back into the position from which Congress removed them, and presents the same risks that known criminals will ultimately obtain bond and abscond or commit further crimes. Indeed, when coupled with the rule that criminal aliens are entitled to release unless the government can demonstrate by

clear and convincing evidence that they are a flight risk or danger, the court's revision of Section 1226(c) makes matters even worse.

If in an exceptional case detention of an alien during removal proceedings extends markedly beyond the norm under the circumstances without justification and becomes potentially unreasonable and arbitrary, an as-applied due process challenge may be brought in which the court can evaluate all of the relevant circumstances, while according great weight to Congress's categorical determination that detention is to be mandatory. But the Ninth Circuit had no basis to impose a rigid six-month cap.

C. The Court Of Appeals Erred In Requiring Additional Bond Hearings Automatically Every Six Months And Otherwise Rewriting The Procedures That Govern Existing Bond Hearings

The court of appeals further erred in its rewriting of the procedures that govern bond hearings, and in particular (1) requiring bond hearings for all class members automatically every six months, including for aliens detained under Section 1226(a) who have already had a bond hearing and were denied bond or failed to post bond; (2) shifting the burden of proof in such bond hearings to the government; (3) raising the standard of proof to demand clear and convincing evidence that the alien is a flight risk or danger; and (4) requiring immigration judges to consider as a factor the length of time the alien has already been detained. The court invented those rules out of whole cloth.

Congress has provided that, when an alien is detained during removal proceedings under Section 1226(a), the Secretary "may" release him on bond. 8

U.S.C. 1226(a)(2). Governing regulations in turn provide that aliens can obtain a bond hearing before an immigration judge, 8 C.F.R. 236.1(d)(1), 1231.1(d)(1), and that such aliens can subsequently obtain an additional hearing by "showing that [their] circumstances have changed materially." 8 C.F.R. 1003.19(e). These regulations are not arbitrary and capricious, and they warrant full deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984). The court of appeals provided no basis for invalidating these regulations on their face.

There is similarly no basis for the court of appeals' revision of the burden and standard of proof in bond hearings. Indeed, Section 1226(c) unambiguously forecloses the court's holding that the government must bear the burden of proving, by clear and convincing evidence, that a criminal alien is a danger or a flight risk: Congress provided that, in the "only" situation when a criminal alien may be released during removal proceedings—for witness-protection purposes—"*the alien*" must demonstrate that he is *not* a flight risk or danger to the community. 8 U.S.C. 1226(c)(2) (emphasis added). Governing regulations and BIA decisions also unambiguously foreclose the court's view regarding the burden and standard of proof in bond hearings under Section 1226(a): They provide that "*the alien* must demonstrate" that he is not a flight risk or danger to persons or property. 8 C.F.R. 236.1(c)(8), 1236.1(c)(8) (emphasis added); see *In re Guerra*, 24 I. & N. Dec. 37, 40 (B.I.A. 2006) ("The burden is on the alien."). And in *Zadvydas*, this Court similarly placed the burden on "the alien" who is subject to potentially indefinite detention following entry of a final order of removal to show "that

there is no significant likelihood of removal in the reasonably foreseeable future." 533 U.S. at 680.

Section 1226(c)(2) and federal regulations also foreclose the court's revision of the factors that immigration judges must consider in determining whether to grant bond: They unambiguously provide that release (in the narrow circumstances in which it is allowed) depends solely on whether the alien is a flight risk or danger to the community. See 8 U.S.C. 1226(c)(2); 8 C.F.R. 236.1(c)(8), 1236.1(c)(8). Forcing immigration judges also to consider the passage of time further incentivizes aliens to delay their proceedings and creates an anomalous result. As the government gets closer to removing an alien and thus its interest in detention to effectuate removal *strengthens*, the alien becomes more likely to obtain bond and thereby to thwart removal by absconding. And absconding is already a serious problem in the immigration system. The Executive Office for Immigration Review (EOIR) reports that, from fiscal years 2010 through 2014, 38,441 aliens who were released during removal proceedings—31% of the total—absconded and had orders of removal entered against them *in absentia*. Office of Planning, Analysis, & Technology, *FY 2014 Statistics Yearbook*, P3 (Mar. 2015) (*2014 Yearbook*).[4] The passage of time does nothing to mitigate that risk (or the risk that an alien will commit crimes if released).

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[4] http://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/03/16/fy14syb.pdf.

II. THE COURT OF APPEALS' DECISION IS EXTRAORDINARILY IMPORTANT AND CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS

A. The court of appeals' ruling that all aliens arriving at our borders are entitled to a bond hearing and the prospect of release after six months—particularly when coupled with its rulings that any such alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or danger—presents an issue of extraordinary importance. In conflict with *Mezei*, the court of appeals has deprived the Executive of plenary control to protect the Nation's borders by providing an avenue for inadmissible aliens who are merely "on the threshold of initial entry" to obtain release into the United States over DHS's objection. 345 U.S. at 212. That ruling is obviously significant. Hundreds of thousands of aliens arrive at our borders each year, and a significant proportion of those aliens arrive in States in the Ninth Circuit. See DHS, Office of Immigration Statistics, *2013 Yearbook of Immigration Statistics*, tbl. 35 (Aug. 2014).[5] The United States has an overriding interest in protecting its territorial sovereignty through the use of all of the tools enacted by Congress, including immigration detention, to address and diminish waves of illegal immigration. See *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 163 (1993).

B. The court of appeals' revision of Section 1226(c) also warrants this Court's review. As set forth above,

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[5] https://www.dhs.gov/sites/default/files/publications/ois_yb_2013_0.pdf.

the court of appeals' categorical ruling that mandatory detention of criminal and terrorist aliens under Section 1226(c) automatically terminates at six months, and that those aliens must be given bond hearings with the prospect of release, conflicts with this Court's decision in *Demore*.

The court of appeals' ruling also solidifies an acknowledged split of authority among the circuit courts of appeals. See *Lora* v. *Shanahan*, 804 F.3d 601, 614 (2d Cir. 2015) (describing the split and collecting citations). The Second Circuit has recently chosen to "follow the Ninth Circuit" and adopted the "bright-line approach," requiring bond hearings by the six-month mark for aliens detained under Section 1226(c). *Lora*, 804 F.3d at 615-616.[6] By contrast, the Third and Sixth Circuits, while taking the position that detention without a bond hearing under Section 1226(c) is limited to a "reasonable" time, have squarely rejected the rigid six-month rule and instead assess reasonableness based on a case-specific balancing inquiry. See *Ly*, 351 F.3d at 271-273 (rejecting a "bright-line time limitation"); *Diop* v. *ICE/Homeland Sec.*, 656 F.3d 221, 233 (3d Cir. 2011) ("We decline to establish a universal point at which detention will always be considered unreasonable."); see also *Leslie* v. *Attorney Gen. of U.S.*, 678 F.3d 265, 269 (3d Cir. 2012) (discussing "[t]he fact-dependent inquiry"); *Chavez-Alvarez*, 783 F.3d at 474 ("By its very nature, the use of a balancing framework makes any determination on reasonableness highly fact-specific."). The

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[6] Simultaneously with filing this petition, the government is filing a petition for a writ of certiorari seeking review of *Lora* and requesting that the *Lora* petition be held pending the disposition of this case.

injunction affirmed by the Ninth Circuit here thus would have been reversed in the Third or Sixth Circuits.

This Court's review is warranted to resolve this circuit split. As it stands, criminal and terrorist aliens who are otherwise identically situated will automatically get bond hearings and the prospect of release by the six-month mark (and automatically every six months after that) if they are detained in the Second or Ninth Circuits; perhaps receive such hearings at some later time if they are detained in the Third or Sixth Circuits, depending on whether their detention has become unreasonable on case-specific facts; or remain subject to the mandatory detention Section 1226(c) prescribes and not receive a bond hearing during ongoing removal proceedings, if they are detained in another circuit. This divide thus leads to the disparate treatment of otherwise similarly-situated aliens. Whether a person is detained for the duration of his removal proceedings, without bond, should not depend on whether he or she happens to be in immigration proceedings in New York City or across the river in New Jersey.

The practical impact of this divide is serious. The Second and Ninth Circuits account for a significant proportion of this country's total immigration court docket. See *2014 Yearbook* W2 (caseload by immigration court). In those circuits, criminal aliens who Congress categorically determined were too dangerous and too likely to abscond even to be afforded bond hearings will nonetheless have bond hearings and the prospect of entitlement to release, and, given the Ninth Circuit's burden-of-proof rule, many actually will be released. See Resp. C.A. Br. 22 ("[F]rom Oc-

tober 2012 to April 2014, approximately 70% of class members were granted bond at their hearings, and approximately 70% of those individuals posted bond and were released."). It is a statistical certainty, moreover, that some of those criminal aliens will abscond and that some will commit further crimes that detention would have prevented. See *Demore*, 538 U.S. at 518 (citing statistical evidence of recidivism and flight).

C. The court of appeals' wholesale revisions to the procedures that apply in bond hearings also warrant this Court's review, as they greatly exacerbate the damage caused by the court's revision of the statutes and regulations governing the duration of mandatory detention. They dramatically increase the likelihood that inadmissible aliens arriving for the first time at our borders, known criminals, and other aliens who are flight risks or dangers to the community will nonetheless be released into the United States. For example, DHS will often be unable to show by clear and convincing evidence that an inadmissible alien newly arriving at our Nation's doorstep is a flight risk or danger.

These rulings also have significant operational consequences. EOIR reports that, even without being required to give new bond hearings automatically every six months to all aliens in removal proceedings, immigration judges redetermined bond 321,886 times in fiscal years 2010 through 2014, for an average of approximately 64,000 hearings per year. *2014 Yearbook* A8. The Ninth Circuit's rulings have significantly increased immigration judges' caseload, forcing the limited number of immigration judges to divert time and attention to *Rodriguez* bond hearings—rather

than adjudicating whether aliens are actually removable. The process of deciding immigration cases thus will take longer, potentially leading to even more aliens becoming entitled to *Rodriguez* hearings (and in turn obtaining release) under the court's erroneous revision of the immigration laws and regulations.

More broadly, the court of appeals' rulings impede DHS's pursuit of its highest enforcement priorities. The Secretary has directed DHS to focus its limited enforcement resources, "to the greatest degree possible," on removing aliens who are serious criminals or threats to the national security, and securing the border by removing aliens who have recently crossed illegally. Memorandum from Jeh C. Johnson, Sec'y of DHS, *Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants* 1-3, 5 (Nov. 20, 2014);[7] see Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, H.R. 2029, Div. F, Tit. II, 114th Cong., 1st Sess. 256 (prioritizing removal of serious criminals). The court of appeals' decision directly interferes with those efforts. First, it impedes DHS's ability to control the Nation's borders: When inadmissible aliens seek to enter the United States, DHS will no longer be able to detain them for as long as needed to effectuate their removal. Instead, DHS will face an arbitrary six-month cap on mandatory detention of arriving aliens under Section 1225(b). The Ninth Circuit has thus taken out of DHS's hands the decision whether an alien should be permitted to enter the interior, instead handing that decision to an immigration judge and requiring DHS to provide clear and convincing evidence to prevent his release. And the

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[7] https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

court's six-month rule creates incentives for aliens to attempt an illegal entry and, if caught, to delay proceedings long enough to obtain via a bond hearing the possibility of release into the interior—the very thing they sought, and Congress sought in Section 1225(b) to prevent—when they illegally attempted to enter in the first place.

Second, the court of appeals' decision impedes DHS's ability to remove serious criminals. It prevents DHS from detaining criminal aliens under Section 1226(c) for as long as needed to effectuate their removal; it creates an incentive for aliens detained under Section 1226(c) to delay removal proceedings; and it gives criminal aliens an entitlement to be released—and thus the ability to abscond or commit further crimes—unless DHS can make a heightened evidentiary showing. The Ninth Circuit's rulings thus cut to the heart of DHS's primary mission in enforcing the immigration laws, in contravention of the governing laws and regulations and this Court's precedents.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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MARCH 2016

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 13-56706 and 13-56755
D.C. No. 2:07-cv-03239-TJH-RNB

ALEJANDRO RODRIGUEZ; ABDIRIZAK ADEN FARAH; JOSE FARIAS CORNEJO; YUSSUF ABDIKADIR; ABEL PEREZ RUELAS, FOR THEMSELVES AND ON BEHALF OF A CLASS OF SIMILARLY SITUATED INDIVIDUALS, PETITIONERS-APPELLEES/CROSS-APPELLANTS

AND

EFREN OROZCO, PETITIONER

v.

TIMOTHY ROBBINS, FIELD OFFICE DIRECTOR, LOS ANGELES DISTRICT, IMMIGRATION AND CUSTOMS ENFORCEMENT; JEH JOHNSON, SECRETARY, HOMELAND SECURITY; LORETTA E. LYNCH, ATTORNEY GENERAL; WESLEY LEE, ASSISTANT FIELD OFFICE DIRECTOR, IMMIGRATION AND CUSTOMS ENFORCEMENT; RODNEY PENNER, CAPTAIN, MIRA LOMA DETENTION CENTER; SANDRA HUTCHENS, SHERIFF OF ORANGE COUNTY; NGUYEN, OFFICER, OFFICER-IN-CHARGE, THEO LACY FACILITY; DAVIS NIGHSWONGER, CAPTAIN, COMMANDER, THEO LACY FACILITY; MIKE KREUGER, CAPTAIN, OPERATIONS MANAGER, JAMES A. MUSICK FACILITY; ARTHUR EDWARDS, OFFICER-IN-CHARGE, SANTA ANA CITY JAIL; RUSSELL DAVIS, JAIL ADMINISTRATOR, SANTA

ANA CITY JAIL; JUAN P. OSUNA,* DIRECTOR, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, RESPONDENTS-APPELLANTS/CROSS-APPELLEES

Argued and Submitted:
July 24, 2015—Pasadena, California
Filed: Oct. 28, 2015

OPINION

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, Senior District Judge, Presiding

Before: KIM MCLANE WARDLAW and RONALD M. GOULD, Circuit Judges and SAM E. HADDON,** District Judge.

WARDLAW, Circuit Judge:

This is the latest decision in our decade-long examination of civil, i.e. non-punitive and merely preventative, detention in the immigration context. As we noted in our prior decision in this case, *Rodriguez v. Robbins* (*Rodri-*

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* Juan P. Osuna is substituted for his predecessor, Thomas G. Snow, as Director, Executive Office for Immigration Review, pursuant to Federal Rule of Appellate Procedure 43(c).

** The Honorable Sam E. Haddon, District Judge for the U.S. District Court for the District of Montana, sitting by designation.

guez II), 715 F.3d 1127 (9th Cir. 2013), thousands of immigrants to the United States are locked up at any given time, awaiting the conclusion of administrative and judicial proceedings that will determine whether they may remain in this country. In 2014, U.S. Immigration and Customs Enforcement ("ICE") removed 315,943 individuals, many of whom were detained during the removal process.[1] According to the most recently available statistics, ICE detains more than 429,000 individuals over the course of a year, with roughly 33,000 individuals in detention on any given day.[2]

Alejandro Rodriguez, Abdirizak Aden Farah, Jose Farias Cornejo, Yussuf Abdikadir, Abel Perez Ruelas, and Efren Orozco ("petitioners") represent a certified class of noncitizens who challenge their prolonged detention pursuant to 8 U.S.C. §§ 1225(b), 1226(a), 1226(c), and 1231(a) without individualized bond hearings and determinations to justify their continued detention. Their case is now on appeal for the third time. After a three-judge panel of our court reversed the district court's denial of petitioners' motion for class certification, and after our decision affirming the district court's entry of a preliminary injunction, the district court granted summary judgment to the class and entered a permanent injunction. Under the

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[1] U.S. Immigration and Customs Enforcement, Enforcement and Removal Operations Report 7 (2014), https://www.ice.gov/doclib/about/offices/ero/pdf/2014-ice-immigration-removals.pdf.

[2] U.S. Immigration and Customs Enforcement, ERO Facts and Statistics 3 (2011), http://www.ice.gov/doclib/foia/reports/ero-facts-and-statistics.pdf.

permanent injunction, the government must provide any class member who is subject to "prolonged detention"—six months or more—with a bond hearing before an Immigration Judge ("IJ"). At that hearing, the government must prove by clear and convincing evidence that the detainee is a flight risk or a danger to the community to justify the denial of bond. The government appeals from that judgment. We affirm in part and reverse in part.

I. Background

On May 16, 2007, Alejandro Garcia commenced this case by filing a petition for a writ of habeas corpus in the Central District of California. Garcia's case was consolidated with a similar case filed by Alejandro Rodriguez, and the petitioners moved for class certification. The motion was denied on March 21, 2008.

A three-judge panel of our court reversed the district court's order denying class certification.[3] *Rodriguez I*, 591 F.3d 1105. We held that the proposed class satisfied each requirement of Federal Rule of Civil Procedure 23: The government conceded that the class was sufficiently numerous; each class member's claim turned on the common question of whether detention for more than six months without a bond hearing raises serious constitutional concerns; Rodriguez's claims were sufficiently typ-

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[3] Judge Betty Binns Fletcher was on the panel as originally constituted and authored the opinion in *Rodriguez v. Hayes* (*Rodriguez I*), 578 F.3d 1032 (9th Cir. 2009), *amended by* 591 F.3d 1105 (9th Cir. 2010). Judge Wardlaw was selected by random draw to replace Judge B. Fletcher on the panel following her death in 2012.

ical of the class's because "the determination of whether [he] is *entitled* to a bond hearing will rest largely on interpretation of the statute authorizing his detention"; and Rodriguez, through his counsel, adequately represented the class. *Id.* at 1122-25. The panel also noted that "any concern that the differing statutes authorizing detention of the various class members will render class adjudication of class members' claims impractical or undermine effective representation of the class" could be addressed through "the formation of subclasses." *Id.* at 1123.

The government petitioned our court for panel rehearing or rehearing en banc. In response, the panel amended the opinion to expand its explanation of why the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") does not bar certification of the class and, with that amendment, unanimously voted to deny the government's petition. The full court was advised of the suggestion for rehearing en banc, and no judge requested a vote on whether to rehear the matter. *See* Fed. R. App. P. 35. The government did not file a petition for certiorari in the United States Supreme Court.

On remand, the district court certified a class defined as:

> all non-citizens within the Central District of California who: (1) are or were detained for longer than six months pursuant to one of the general immigration detention statutes pending completion of removal proceedings, including judicial review, (2) are not and have not been detained pursuant to a national security detention statute, and (3) have not been afforded a

hearing to determine whether their detention is justified.

The district court also approved the proposed subclasses, which correspond to the four statutes under which the class members are detained—8 U.S.C. §§ 1225(b), 1226(a), 1226(c), and 1231(a). The class does not include suspected terrorists, who are detained pursuant to 8 U.S.C. § 1537. Additionally, because the class is defined as non-citizens who are detained "pending completion of removal proceedings," it excludes any detainee subject to a final order of removal.

On September 13, 2012, the district court entered a preliminary injunction that applied to class members detained pursuant to two of these four "general immigration detention statutes"—§§ 1225(b) and 1226(c). Under the preliminary injunction, the government was required to "provide each [detainee] with a bond hearing" before an IJ and to "release each Subclass member on reasonable conditions of supervision ... unless the government shows by clear and convincing evidence that continued detention is justified based on his or her danger to the community or risk of flight."

The government appealed, and on April 16, 2013, we affirmed. *See Rodriguez II*, 715 F.3d 1127. We applied the Court's preliminary injunction standard set forth in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), which requires the petitioner to "establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and

that an injunction is in the public interest." *Rodriguez II*, 715 F.3d at 1133.

Evaluating petitioners' likelihood of success on the merits, we began with the premise that "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Id.* at 1134 (alterations in original) (quoting *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)). "Thus, the Supreme Court has held that the indefinite detention of a once-admitted alien 'would raise serious constitutional concerns.'" *Id.* (quoting *Zadvydas*, 533 U.S. at 682).

Addressing those concerns, we recognized that we were not writing on a clean slate: "[I]n a series of decisions since 2001, 'the Supreme Court and this court have grappled in piece-meal fashion with whether the various immigration detention statutes may authorize indefinite or prolonged detention of detainees and, if so, may do so without providing a bond hearing.'" *Id.* (quoting *Rodriguez I*, 591 F.3d at 1114). First, in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court resolved statutory and due process challenges to indefinite detention under 8 U.S.C. § 1231(a)(6), which governs detention beyond the ninety-day removal period, where removal was not practicable—for one petitioner because he was stateless, and for another because his home country had no repatriation treaty with the United States. *See id.* at 684-86. Drawing on civil commitment jurisprudence, the Court reasoned:

> A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government to "depriv[e]" any "person . . . of . . . liberty . . . without due process of law." Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects. *See Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992). And this Court has said that government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, *see United States v. Salerno*, 481 U.S. 739, 746, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987), or, in certain special and "narrow" nonpunitive "circumstances," *Foucha*, *supra*, at 80, 112 S. Ct. 1780, where a special justification, such as harm-threatening mental illness, outweighs the "individual's constitutionally protected interest in avoiding physical restraint." *Kansas v. Hendricks*, 521 U.S. 346, 356, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997).

Id. at 690 (alterations in original). To avoid those "serious constitutional concerns," the Court held that § 1231(a)(6) does not authorize indefinite detention without a bond hearing. *Id.* at 682, 699. Noting that the "proceedings at issue here are civil, not criminal," *id.* at 690, the Court "construe[d] the statute to contain an implicit 'reasonable time' limitation," *id.* at 682, and recognized six months as a "presumptively reasonable period of detention," *id.* at 701.

Although in dissent, Justice Kennedy, joined by Chief Justice Rehnquist, disagreed with the majority's application of the canon of constitutional avoidance and argued that the holding would improperly interfere with international repatriation negotiations, Justice Kennedy recognized that "both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious." *Id.* at 721. Justice Kennedy further noted that although the government may detain non-citizens "when necessary to avoid the risk of flight or danger to the community," due process requires "adequate procedures to review their cases, allowing persons once subject to detention to show that through rehabilitation, new appreciation of their responsibilities, or under other standards, they no longer present special risks or danger if put at large." *Id.*

Second, in *Demore v. Kim*, 538 U.S. 510 (2003), the Court addressed a due process challenge to mandatory detention under 8 U.S.C. § 1226(c), which applies to non-citizens convicted of certain crimes. *Id.* at 517-18. After discussing Congress's reasons for establishing mandatory detention, namely, high rates of crime and flight by removable non-citizens, *id.* at 518-21, the Court affirmed its "longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings," *id.* at 526. Distinguishing *Zadvydas*, the Court in *Demore* stressed that detention under § 1226(c) has "a definite termination point" and typically "lasts for less than the 90 days we considered presumptively valid in *Zadvydas*." *Id.* at 529. Although the Court therefore upheld mandatory deten-

tion under § 1226(c), Justice Kennedy's concurring opinion, which created the majority, reasoned that "a lawful permanent resident alien such as respondent could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified." *Id.* at 532.

After *Zadvydas* and *Demore*, our court decided several cases that provided further guidance for our analysis in *Rodriguez II*. In *Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005), we held that the constitutionality of detaining a lawful permanent resident under § 1226(c) for over 32 months was "doubtful." *Id.* at 1242. "To avoid deciding the constitutional issue, we interpret[ed] the authority conferred by § 1226(c) as applying to expedited removal of criminal aliens" and held that "[t]wo years and eight months of process is not expeditious." *Id.* We therefore remanded Tijani's habeas petition to the district court with directions to grant the writ unless the government provided a bond hearing before an IJ within sixty days. *Id.*

We next considered civil detention in the immigration context in *Casas-Castrillon v. Department of Homeland Security* (*Casas*), 535 F.3d 942 (9th Cir. 2008). There, a lawful permanent resident who had been detained for nearly seven years under § 1226(c) and then § 1226(a) sought habeas relief while his petition for review of his removal order was pending before our court. *Id.* at 944-48. Applying *Demore*, we reasoned that § 1226(c) "authorize[s] mandatory detention only for the 'limited period of [the non-citizen's] removal proceedings,' which

the Court estimated 'lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal' his removal order to the [Board of Immigration Appeals ("BIA")]." *Id.* at 950 (quoting *Demore*, 538 U.S. at 529). We therefore concluded that § 1226(c)'s mandatory detention provision applies only during administrative removal proceedings—i.e. until the BIA affirms a removal order. *Id.* at 951. From that point until the circuit court has "rejected [the applicant's] final petition for review or his time to seek such review expires," the government has discretionary authority to detain the noncitizen pursuant to § 1226(a). *Id.* at 948. We noted, however, that "[t]here is a difference between detention being authorized and being necessary as to any particular person." *Id.* at 949. Because the Court's holding in *Demore* turned on the brevity of mandatory detention under § 1226(c), we concluded that "the government may not detain a legal permanent resident such as Casas for a prolonged period without providing him a neutral forum in which to contest the necessity of his continued detention." *Id.* at 949.

Soon after, in *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011), we clarified the procedural requirements for bond hearings held pursuant to our decision in *Casas* ("*Casas* hearings"). In light of "the substantial liberty interest at stake," we held that "due process requires a contemporaneous record of *Casas* hearings," and that the government bears the burden of proving "by clear and convincing evidence that an alien is a flight risk or a danger to the community to justify denial of bond." *Id.* at 1203, 1208.

To evaluate whether the government has met its burden, we instructed IJs to consider the factors set forth in *In re Guerra*, 24 I. & N. Dec. 37 (BIA 2006), in particular "the alien's criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses." *Singh*, 638 F.3d at 1206 (quoting *Guerra*, 24 I. & N. Dec. at 40).

Finally, in *Diouf v. Napolitano* (*Diouf II*), 634 F.3d 1081 (9th Cir. 2011), we extended the procedural protections established in *Casas* to individuals detained under § 1231(a)(6). *Id.* at 1086. We held that "prolonged detention under § 1231(a)(6), without adequate procedural protections," like prolonged detention under § 1226(a), "would raise 'serious constitutional concerns.'" *Id.* (quoting *Casas*, 535 F.3d at 950). To address those concerns, we held that "an alien facing prolonged detention under § 1231(a)(6) is entitled to a bond hearing before an immigration judge and is entitled to be released from detention unless the government establishes that the alien poses a risk of flight or a danger to the community." *Id.* at 1092.

In *Diouf II*, we also adopted a definition of "prolonged" detention—detention that "has lasted six months and is expected to continue more than minimally beyond six months"—for purposes of administering the *Casas* bond hearing requirement. *Id.* at 1092 n.13. We reasoned that:

> When detention crosses the six-month threshold and release or removal is not imminent, the private interests at stake are profound. Furthermore, the risk of

> an erroneous deprivation of liberty in the absence of a hearing before a neutral decisionmaker is substantial. The burden imposed on the government by requiring hearings before an immigration judge at this stage of the proceedings is therefore a reasonable one.

Id. at 1091-92.

Applying these precedents to *Rodriguez* class members detained under § 1226(c), which requires civil detention of non-citizens previously convicted of certain crimes who have already served their state or federal periods of incarceration, we have concluded that "the prolonged detention of an alien without an individualized determination of his dangerousness or flight risk would be constitutionally doubtful." *Rodriguez II*, 715 F.3d at 1137 (quoting *Casas*, 535 F.3d at 951). To avoid these constitutional concerns, we held that "§ 1226(c)'s mandatory language must be construed 'to contain an implicit reasonable time limitation, the application of which is subject to federal-court review.'" *Id.* at 1138 (quoting *Zadvydas*, 533 U.S. at 682). "[W]hen detention becomes prolonged," i.e., at the six-month mark, "§ 1226(c) becomes inapplicable"; the government's authority to detain the noncitizen shifts to § 1226(a), which provides for discretionary detention; and detainees are then entitled to bond hearings. *Id.*

In so holding, we rejected the government's attempt to distinguish *Casas* on the basis that "*Casas* concerned an alien who had received an administratively final removal order, sought judicial review, and obtained a remand to the BIA," whereas this case involves "aliens awaiting the

conclusion of their initial administrative proceedings." *Id.* at 1139. We found that this argument reflected "a distinction without a difference": "'Regardless of the stage of the proceedings, the same important interest is at stake—freedom from prolonged detention.'" *Id.* (quoting *Diouf II*, 634 F.3d at 1087).

We also noted that our conclusion was consistent with the decisions of the two other circuits that have directly addressed this issue. In *Diop v. ICE/Homeland Security*, 656 F.3d 221 (3d Cir. 2011), the Third Circuit, applying the canon of constitutional avoidance, construed § 1226(c) to"authorize[] detention for a reasonable amount of time, after which the authorities must make an individualized inquiry into whether detention is still necessary to fulfill the statute's purposes of ensuring that an alien attends removal proceedings and that his release will not pose a danger to the community." *Id.* at 231. Applying that holding to the facts of the case, the Third Circuit held that the petitioner's detention, which had lasted nearly three years, "was unconstitutionally unreasonable and, therefore, a violation of the Due Process Clause." *Id.* at 233. Although the court declined to adopt a categorical definition of a "reasonable amount of time" to detain a non-citizen without a bond hearing, it read *Demore* as we do—to connect the constitutionality of detention to its length and to authorize detention only for a "limited time." *Id.* at 233-34.

Likewise, in *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003), the Sixth Circuit held that, to avoid a constitutional problem, removable non-citizens may be detained under

§ 1226(c) only "for a reasonable period of time required to initiate and conclude removal proceedings promptly." *Id.* at 273. Finding that the petitioner's 500-day-long detention was "unreasonable," the Sixth Circuit affirmed the district court's grant of a writ of habeas corpus. *Id.* at 265, 271. While maintaining that a "bright-line time limitation, as imposed in *Zadvydas*, would not be appropriate for the pre-removal period," the court recognized that *Demore*'s holding "rel[ies] on the fact that Kim, and persons like him, will normally have their proceedings completed within a short period of time and will actually be deported, or will be released." *Id.* at 271.

As to the *Rodriguez* subclass detained under § 1225(b), we found "no basis for distinguishing between" noncitizens detained under that section and under § 1226(c). *Rodriguez II*, 715 F.3d at 1143. The cases relied upon by the government for the proposition that arriving aliens are entitled to lesser due process protections—namely, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) and *Barrera-Echavarria v. Rison*, 44 F.3d 1441 (9th Cir. 1995) (en banc)—were decided under pre-IIRIRA law and, as such, were inapposite. *Id.* at 1140-41. We therefore held that "to the extent detention under § 1225(b) is mandatory, it is implicitly time-limited." *Id.* at 1144. As we had with § 1226(c), we explained that "the government's detention authority does not completely dissipate at six months; rather, the mandatory provisions of § 1225(b) simply expire at six months, at which point the government's authority to detain the noncitizen would shift to § 1226(a), which is discretionary and

which we have already held requires a bond hearing." *Id.* (citing *Casas*, 535 F.3d at 948).

After establishing that class members detained under § 1226(c) and § 1225(b) are entitled to bond hearings after six months of detention, we clarified that the procedural requirements set forth in *Singh* apply to those hearings. *Id.* at 1139, 1144 (citing *Singh*, 638 F.3d at 1203). These requirements include proceedings before "a neutral IJ" at which "the government bear[s] the burden of proof by clear and convincing evidence," *id.* at 1144 (citing *Singh*, 638 F.3d at 1203-04), a lower burden of proof than that required to sustain a criminal charge.

Having found that the class was likely to succeed on the merits, we turned to the other preliminary injunction factors. We found that the class members "clearly face irreparable harm in the absence of the preliminary injunction" because "the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Id.* (citations omitted). The preliminary injunction safeguards constitutional rights by ensuring that "individuals whom the government cannot prove constitute a flight risk or a danger to public safety, and sometimes will not succeed in removing at all, are not needlessly detained." *Id.* at 1145. Similarly, we found that the balance of equities favored the class members because "needless prolonged detention" imposes "major hardship," whereas the government "cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required to avoid constitutional concerns." *Id.* Finally, we held that the preliminary injunction was consistent with the public

interest, which is "implicated when a constitutional right has been violated," and "benefits from a preliminary injunction that ensures that federal statutes are construed and implemented in a manner that avoids serious constitutional questions." *Id.* at 1146. We therefore affirmed the district court's order.

During the pendency of *Rodriguez II*, the parties conducted discovery, and class counsel adduced extensive evidence detailing the circumstances under which class members are detained. The parties then filed cross-motions for summary judgment, and the petitioners moved for a permanent injunction to extend and expand the preliminary injunction.

On August 6, 2013, after we issued our decision in *Rodriguez II*, the district court granted summary judgment to the class members and entered a permanent injunction. The permanent injunction applies to class members detained under any of the four civil "general immigration detention statutes"—§§ 1225(b), 1226(a), 1226(c), and 1231(a)—and requires the government to provide each detainee with a bond hearing by his 195th day of detention. Applying our decisions in *Casas*, *Singh*, and *Rodriguez II*, the district court further ordered that bond hearings occur automatically, that detainees receive "comprehendible notice," that the government bear the burden of proving "by clear and convincing evidence that a detainee is a flight risk or a danger to the community to justify the denial of bond," and that hearings are recorded. However, the district court declined to order IJs to consider the length of detention or the likelihood of re-

moval during bond hearings, or to provide periodic hearings for detainees who are not released after their first hearing.

The government now appeals from the entry of the permanent injunction, arguing that the district court—and we—erred in applying the canon of constitutional avoidance to each of the statutes at issue. Relying on the Supreme Court's decisions in *Zadvydas* and *Demore*, the government argues that none of the subclasses are categorically entitled to bond hearings after six months of detention. Accordingly, the government contends that we should decertify the class and instead permit as-applied challenges to individual instances of prolonged detention, which could occur only through habeas proceedings. Petitioners counter that *Rodriguez II* is the law of the case and law of the circuit, requiring us to affirm the permanent injunction as to the § 1225(b) and § 1226(c) subclasses, and that non-citizens detained pursuant to § 1226(a) and § 1231(a) are entitled to bond hearings for reasons similar to those discussed in *Rodriguez II*. Petitioners cross-appeal the district court's order as to the procedural requirements for bond hearings; they argue that the district court erred in declining to require that IJs consider the likelihood of removal and the total length of detention, and in declining to require that non-citizens detained for twelve or more months receive periodic bond hearings every six months.

II. Nature of Civil Immigration Detention

Class members spend, on average, 404 days in immigration detention. Nearly half are detained for more

than one year; one in five for more than eighteen months, and one in ten for more than two years. In some cases, detention has lasted much longer: As of April 28, 2012, when the government generated data to produce to the petitioners, one class member had been detained for 1,585 days, approaching four and a half years of civil confinement.[4]

Non-citizens who vigorously pursue claims for relief from removal face substantially longer detention periods than those who concede removability. Requesting relief from an IJ increases the duration of class members' detention by an average of two months; appealing a claim to the BIA adds, on average, another four months; and appealing a BIA decision to the Ninth Circuit typically leads to an additional eleven months of confinement. Class members who persevere through this lengthy process are often successful: About 71% of class members have sought relief from removal, and roughly one-third of those individuals prevailed. However, many detainees choose to give up meritorious claims and voluntarily leave the country instead of enduring years of immigration detention awaiting a judicial finding of their lawful status.

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[4] The government challenges the accuracy of these figures, which are drawn from petitioners' expert report, based on disagreements with that expert's methodology. Using the government's preferred data set and process generates an average detention length of 347 days and a range of 180 to 1,037 days of civil detention for each non-citizen. Under either set of figures, typical class members are detained for well over 180 days. The differences in precise numbers are not material to our decision.

Class members frequently have strong ties to this country: Many immigrated to the United States as children, obtained legal permanent resident status, and lived in this country for as long as twenty years before ICE initiated removal proceedings. As a result, hundreds of class members are married to U.S. citizens or lawful permanent residents, and have children who were born in this country. Further, many class members hold steady jobs—including as electricians, auto mechanics, and roofers—to provide for themselves and their families. At home, they are caregivers for young children, aging parents, and sick or disabled relatives. To the extent class members have any criminal record—and many have no criminal history whatsoever—it is often limited to minor controlled substances offenses. Accordingly, when class members do receive bond hearings, they often produce glowing letters of support from relatives, friends, employers, and clergy attesting to their character and contributions to their communities.

Prolonged detention imposes severe hardship on class members and their families. Civil immigration detainees are treated much like criminals serving time: They are typically housed in shared jail cells with no privacy and limited access to larger spaces or the outdoors. Confinement makes it more difficult to retain or meet with legal counsel, and the resources in detention facility law libraries are minimal at best, thereby compounding the challenges of navigating the complexities of immigration law and proceedings. In addition, visitation is restricted and is often no-contact, dramatically disrupting family relationships. While in detention, class members have

missed their children's births and their parents' funerals. After losing a vital source of income, class members' spouses have sought government assistance, and their children have dropped out of college.

Lead petitioner Alejandro Rodriguez's story is illustrative. Rodriguez came to the United States as an infant and has lived here continuously since then. Rodriguez is a lawful permanent resident of the United States, and his entire immediate family—including his parents, siblings, and three young children—also resides in the United States as citizens or lawful permanent residents. Before his removal proceedings began, Rodriguez worked as a dental assistant. In 2003, however, Rodriguez was convicted of possession of a controlled substance and sentenced to five years of probation and no jail time. He had one previous conviction, for "joyriding."

In 2004, ICE commenced removal proceedings and subjected Rodriguez to civil detention. An IJ determined that Rodriguez's prior conviction for "joyriding," i.e. driving a stolen vehicle, qualified as an "aggravated felony" that rendered him ineligible for relief in the form of cancellation of removal, and therefore ordered him removed. Rodriguez appealed the IJ's decision to the BIA, which affirmed, and then to the Ninth Circuit. In July 2005, a three-judge panel of our court granted the government's motion to hold Rodriguez's case in abeyance until the Supreme Court decided a related case, *Gonzales v. Penuliar*, 549 U.S. 1178 (2007), which issued eighteen months later, in January 2007. In *Penuliar*, the Supreme Court vacated our court's opinion and remanded

for further consideration in light of *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), which held that violating a California statute prohibiting taking a vehicle without the owner's consent qualifies as a "theft offense." Between July 2005 and January 2007, while Rodriguez's case was in abeyance, ICE conducted four custody reviews on Rodriguez and repeatedly determined that Rodriguez was required to remain in detention until our court issued a decision on the merits of his claim. In mid-2007, about a month after Rodriguez had moved for class certification, however, ICE released him. At that point, Rodriguez had been detained for 1,189 days, roughly three years and three months. In April 2008, in the related case on remand from the Supreme Court, our court held that driving a stolen vehicle did not qualify as an aggravated felony. *Penuliar v. Mukasey*, 528 F.3d 603, 614 (9th Cir. 2008). On motion of the parties, we then remanded Rodriguez's petition to the BIA, which granted his application for cancellation of removal, vindicating his right to lawfully remain in the United States.

III. Standard of Review

"We review a grant of summary judgment *de novo*." *Pavoni v. Chrysler Grp., LLC*, 789 F.3d 1095, 1098 (9th Cir. 2015). "A permanent injunction 'involves factual, legal, and discretionary components,' so we 'review a decision to grant such relief under several different standards.'" *Vietnam Veterans of Am. v. C.I.A.*, 791 F.3d 1122, 1129 (9th Cir. 2015) (quoting *Momot v. Mastro*, 652 F.3d 982, 986 (9th Cir. 2011)). "We review legal conclusions . . . de novo, factual findings for clear error, and the scope of the injunction for abuse of discretion." *Id.*

IV. Discussion

In resolving whether the district court erred in entering the permanent injunction, we consider, first, petitioners' entitlement to bond hearings and, second, the procedural requirements for such hearings. Based on our precedents, we hold that the canon of constitutional avoidance requires us to construe the statutory scheme to provide all class members who are in prolonged detention with bond hearings at which the government bears the burden of proving by clear and convincing evidence that the class member is a danger to the community or a flight risk. However, we also conclude that individuals detained under § 1231(a) are not members of the certified class. We affirm the district court's order insofar as it requires automatic bond hearings and requires IJs to consider alternatives to detention because we presume, like the district court, that IJs are already doing so when determining whether to release a non-citizen on bond.[5] Because the same constitutional concerns arise when detention approaches another prolonged period, we

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[5] *See* 8 C.F.R. § 241.4(f) (listing factors that Department of Homeland Security ("DHS") must "weigh[] in considering whether to recommend further detention or release of a detainee," including the detainee's criminal history, evidence of recidivism or rehabilitation, ties to the United States, history of absconding or failing to appear for immigration or other proceedings, and the likelihood that the detainee will violate the conditions of release); *id.* § 1236.1(d)(1) (authorizing IJs to "detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released" and to "ameliorat[e] the conditions" of release imposed by DHS).

hold that IJs must provide bond hearings periodically at six month intervals for class members detained for more than twelve months. However, we reject the class's suggestion that we mandate additional procedural requirements.

A. Civil Detention

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). Civil detention violates the Due Process Clause except "in certain special and narrow nonpunitive circumstances, where a special justification, such as harm-threatening mental illness, outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Zadvydas*, 533 U.S. at 690 (citations omitted). Consistent with these principles, the Supreme Court has—outside of the immigration context—found civil detention constitutional without any individualized showing of need only when faced with the unique exigencies of global war or domestic insurrection. *See Ludecke v. Watkins*, 335 U.S. 160 (1948); *Korematsu v. United States*, 323 U.S. 214 (1944); *Moyer v. Peabody*, 212 U.S. 78 (1909).[6] And even in those extreme circumstances, the Court's decisions have been widely criticized. *See, e.g.*, Eugene V. Rostow, *The Jap-*

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[6] For a thorough discussion of civil detention jurisprudence and its bearing on the constitutionality of civil detention in the immigration context, *see* Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 Hastings L.J. 363 (2014), and David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 Emory L.J. 1003 (2002).

anese American Cases—A Disaster, 54 Yale L.J. 489 (1945). In all contexts apart from immigration and military detention, the Court has found that the Constitution requires some individualized process and a judicial or administrative finding that a legitimate governmental interest justifies detention of the person in question.

For example, in numerous cases addressing the civil detention of mentally ill persons, the Court has consistently recognized that such commitment "constitutes a significant deprivation of liberty," and so the state "must have a constitutionally adequate purpose for the confinement." *Jones v. United States*, 463 U.S. 354, 361 (1983) (citations omitted). Further, the "nature and duration of commitment" must "bear some reasonable relation to the purpose for which the individual is committed." *Jones*, 463 U.S. at 368 (citation omitted).

Accordingly, the state may detain a criminal defendant found incapable of standing trial, but only for "the reasonable period of time necessary to determine whether there is a substantial probability that he will attain [the] capacity [to stand trial] in the foreseeable future." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). At all times, the individual's "commitment must be justified by progress toward that goal." *Id.* Likewise, the state may detain a criminal defendant following an acquittal by reason of insanity in order to "treat the individual's mental illness and protect him and society from his potential dangerousness." *Jones*, 463 U.S. at 368. However, the detainee "is entitled to release when he has recovered his sanity or is no longer dangerous." *Id.*; *see also Foucha v.*

Louisiana, 504 U.S. 71, 78 (1992) ("[K]eeping Foucha against his will in a mental institution is improper absent a determination in civil commitment proceedings of current mental illness and dangerousness."). Further, although the state may detain sexually dangerous individuals even after they have completed their criminal sentences, such confinement must "take[] place pursuant to proper procedures and evidentiary standards." *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997). To "justify indefinite involuntary commitment," the state must prove both "dangerousness" and "some additional factor, such as a 'mental illness' or 'mental abnormality.'" *Id.* at 358 (collecting cases).

Similarly, the Court has held that pretrial detention of individuals charged with "the most serious of crimes" is constitutional only because, under the Bail Reform Act, an "arrestee is entitled to a prompt detention hearing" to determine whether his confinement is necessary to prevent danger to the community. *Salerno*, 481 U.S. at 747. Further, "the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act." *Id.*; *see also Schall v. Martin*, 467 U.S. 253, 263 (1984) (upholding a statute that "permits a brief pretrial detention based on a finding of a 'serious risk' that an arrested juvenile may commit a crime before his return date").

In addition, the Court has held that incarceration of individuals held in civil contempt is consistent with due process only where the contemnor receives adequate procedural protections and the court makes specific findings

as to the individual's ability to comply with the court order. *See Turner v. Rogers*, 131 S. Ct. 2507, 2520 (2011). If compliance is impossible—for instance, if the individual lacks the financial resources to pay court-ordered child support—then contempt sanctions do not serve their purpose of coercing compliance and therefore violate the Due Process Clause. *See id.*

Early cases upholding immigration detention policies were a product of their time. *See Carlson v. Landon*, 342 U.S. 524 (1952) (McCarthy Era deportation of communists); *Ludecke v. Watkins*, 335 U.S. 160 (1948) (removal of German enemy aliens during World War II); *Wong Wing v. United States*, 163 U.S. 228 (1896) (Chinese exclusion). Yet even these cases recognized some limits on detention of non-citizens pending removal. Such detention may not be punitive—Congress may not, for example, impose sentences of "imprisonment at hard labor" on non-citizens awaiting deportation, *Wong Wing*, 163 U.S. at 235—and it must be supported by a legitimate regulatory purpose. Under these principles, the Court authorized the "detention or temporary confinement" of Chinese-born non-citizens "pending the inquiry into their true character, and while arrangements were being made for their deportation." *Id.* The Court also upheld executive detention of enemy aliens after the cessation of active hostilities because deportation is "hardly practicable" in the midst of war, and enemy aliens' "potency for mischief" continues "even when the guns are silent." *Ludecke*, 335 U.S. at 166. Similarly, the Court approved detention of communists to limit their "opportunities to hurt the United States during the pendency of deportation pro-

ceedings." *Carlson*, 342 U.S. at 538. The Court recognized, however, that "purpose to injure could not be imputed generally to all aliens subject to deportation." *Id.* at 538. Rather, if the Attorney General wished to exercise his discretion to deny bail, he was required to do so at a hearing, the results of which were subject to judicial review. *Id.* at 543.

More recently, the Supreme Court has drawn on decades of civil detention jurisprudence to hold that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem." *Zadvydas*, 533 U.S. at 690. Although the state has legitimate interests in "ensuring the appearance of aliens at future immigration proceedings" and "protecting the community," post-removal period detention does not uniformly "'bear[] [a] reasonable relation to the purpose for which the individual [was] committed.'" *Id.* (second and third alterations in original) (quoting *Jackson*, 406 U.S. at 738). To avoid constitutional concerns, the Court construed 8 U.S.C. § 1231(a)(6), the statute governing post-removal period detention, to "limit[] an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States." *Id.* at 689. Detention beyond that point requires "strong procedural protections" and a finding that the noncitizen is "specially dangerous." *Id.* at 691.

Soon after *Zadvydas*, the Court rejected a due process challenge to mandatory detention under 8 U.S.C. § 1226(c), which applies to non-citizens convicted of certain crimes. *Demore*, 538 U.S. at 517-18. While affirm-

ing its "longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings," *id.* at 526, the Court emphasized that detention under § 1226(c) was constitutionally permissible because it has "a definite termination point" and typically "lasts for less than . . . 90 days," *id.* at 529.

Since *Zadvydas* and *Demore*, our court has "grappled in piece-meal fashion with whether the various immigration detention statutes may authorize indefinite or prolonged detention of detainees and, if so, may do so without providing a bond hearing." *Rodriguez II*, 715 F.3d at 1134 (quoting *Rodriguez I*, 591 F.3d at 1114). As we recognized in *Casas*, "prolonged detention without adequate procedural protections would raise serious constitutional concerns." *Casas*, 535 F.3d at 950; *see also Rodriguez II*, 715 F.3d at 1144 (discussing "the constitutional concerns raised by prolonged mandatory detention"); *Singh*, 638 F.3d at 1208 ("The private interest here—freedom from prolonged detention—is unquestionably substantial."); *Diouf II*, 634 F.3d at 1085 ("When the period of detention becomes prolonged, 'the private interest that will be affected by the official action' is more substantial; greater procedural safeguards are therefore required.") (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). We have therefore held that non-citizens detained pursuant to § 1226(a) and § 1231(a)(6) are entitled to bond hearings before an IJ when detention becomes prolonged. *See Casas*, 535 F.3d at 949 (requiring bond hearings for individuals detained under § 1226(a)); *Diouf II*, 634 F.3d at

1084 (extending *Casas* to individuals detained under § 1231(a)(6)).

While the government falsely equates the bond hearing requirement to mandated release from detention or facial invalidation of a general detention statute, our precedents make clear that there is a distinction "between detention being authorized and being necessary as to any particular person." *Casas*, 535 F.3d at 949. Bond hearings do not restrict the government's legitimate authority to detain inadmissible or deportable non-citizens; rather, they merely require the government to "justify denial of bond" with clear and convincing "evidence that an alien is a flight risk or danger to the community." *Singh*, 638 F.3d at 1203. And, in the end, the government is required only to establish that it has a legitimate interest reasonably related to continued detention; the discretion to release a non-citizen on bond or other conditions remains soundly in the judgment of the immigration judges the Department of Justice employs.

Prior decisions have also clarified that detention becomes "prolonged" at the six-month mark. In *Zadvydas*, the Supreme Court recognized six months as a "presumptively reasonable period of detention." 533 U.S. at 701. By way of background, the Court noted that in 1996, Congress had "shorten[ed] the removal period from six months to 90 days." *Id.* at 698. The Court then explained:

> While an argument can be made for confining any presumption to 90 days, we doubt that when Congress shortened the removal period to 90 days in 1996 it be-

> lieved that all reasonably foreseeable removals could be accomplished in that time. We do have reason to believe, however, that Congress previously doubted the constitutionality of detention for more than six months. Consequently, for the sake of uniform administration in the federal courts, we recognize that period.

Id. at 701 (citation omitted); *see also Clark v. Martinez*, 543 U.S. 371, 386 (2005) (applying "the 6-month presumptive detention period" the Supreme Court "prescribed in *Zadvydas*"); *cf. Nadarajah v. Gonzales*, 443 F.3d 1069, 1078-79 (9th Cir. 2006) (discussing the Patriot Act's requirement that "detention of suspected terrorists or other threats to national security" be reviewed "at six month intervals"). Following *Zadvydas*, we have defined detention as "prolonged" when "it has lasted six months and is expected to continue more than minimally beyond six months." *Diouf II*, 634 F.3d at 1092 n.13.[7] At that point, we have explained, "the private interests at stake are profound," and "the risk of an erroneous deprivation of liberty in the absence of a hearing before a neutral decisionmaker is substantial." *Id.* at 1092.

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[7] As we noted in *Rodriguez II*, this holding does not conflict with the Supreme Court's decision in *Demore*, 538 U.S. 510, which approved only "brief period[s]" of detention without individualized determinations as to dangerousness and flight risk. *Demore*, 538 U.S. at 513, 523.

B. Entitlement to a Bond Hearing

With this well-established precedent of the Supreme Court and our Court in mind, we review the district court's grant of summary judgment and entry of a permanent injunction. We consider, in turn, whether individuals detained under §§ 1226(c), 1225(b), 1226(a), and 1231(a) are entitled to bond hearings after they have been detained for six months.

1. The § 1226(c) Subclass

Section 1226(c) requires that the Attorney General detain any non-citizen who is inadmissible or deportable because of his criminal history upon that person's release from imprisonment, pending proceedings to remove him from the United States.[8] Detention under § 1226(c) is

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[8] Mandatory detention under § 1226(c) applies to non-citizens who are inadmissible on account of having committed a crime involving moral turpitude or a controlled substance offense; having multiple criminal convictions with an aggregate sentence of five years or more of confinement; having connections to drug trafficking, prostitution, commercialized vice, money laundering, human trafficking, or terrorism; having carried out severe violations of religious freedom while serving as a foreign government official; or having been involved in serious criminal activity and asserting immunity from prosecution. It also applies to noncitizens who are deportable on account of having been convicted of two or more crimes involving moral turpitude, an aggravated felony, a controlled substance offense, certain firearm-related offenses, or certain other miscellaneous crimes; having committed a crime of moral turpitude within a certain period of time since their date of admission for which a sentence of one year or longer has been imposed; or having connections to terrorism. *See* 8 U.S.C.

mandatory. Individuals detained under that section are not eligible for release on bond or parole, *see* 8 U.S.C. § 1226(a); they may be released only if the Attorney General deems it "necessary" for witness protection purposes, *id.* § 1226(c)(2).

An individual detained under § 1226(c) may ask an IJ to reconsider whether the mandatory detention provision applies to him, *see* 8 C.F.R. § 1003.19(h)(2)(ii), but such review is limited in scope and addresses only whether the individual is properly included in a category of noncitizens subject to mandatory detention based on his criminal history. *See generally In re Joseph*, 22 I. & N. Dec. 799 (BIA 1999). At a "*Joseph* hearing," a detainee "may avoid mandatory detention by demonstrating that he is not an alien, was not convicted of the predicate crime, or that the [DHS] is otherwise substantially unlikely to establish that he is in fact subject to mandatory detention." *Demore*, 538 U.S. at 514 n.3. "A determination in favor of an alien" at a *Joseph* hearing "does not lead to automatic release," *Joseph*, 22 I. & N. Dec. at 806, because the government retains discretionary authority to detain the individual under § 1226(a). Instead, such a determination allows the IJ to consider granting bond under the § 1226(a) standards, namely, whether the detainee would pose a danger or flight risk if released. *See id.*; *see also Demore*, 538 U.S. at 532 (Kennedy, J., concurring).

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§ 1226(c) (cross-referencing 8 U.S.C. §§ 1182(a)(2), 1227(a)(2)(A)(ii), 1227(a)(2)(A)(iii), 1227(a)(2)(B), 1227(a)(2)(C), 1227(a)(2)(D), 1227(a)(2)(A)(i), 1182(a)(3)(B), 1227(a)(4)(B)).

As a result of § 1226(c)'s mandatory language and the limited review available through a *Joseph* hearing, individuals are often detained for years without adequate process. *See, e.g.*, *Tijani*, 430 F.3d at 1242 (lawful permanent resident detained for more than two and a half years). Members of the § 1226(c) subclass also tend to be detained for longer periods than other class members: The longest-detained class member was confined for 1,585 days and counting as of April 28, 2012, and the average subclass member faces detention for 427 days. These lengthy detention times bear no relationship to the seriousness of class members' criminal history or the lengths of their previously served criminal sentences. In several instances identified by class counsel, a class member was sentenced to one to three months in prison for a minor controlled substances offense, then endured one or two *years* in immigration detention. Nor do these detention durations bear any relation to the merits of the subclass members' claims: Of the § 1226(c) subclass members who apply for relief from removal, roughly 40% are granted such relief, a rate even higher than that of the overall class.

In *Rodriguez II*, we held that "the prolonged detention of an alien [under § 1226(c)] without an individualized determination of his dangerousness or flight risk would be constitutionally doubtful." 715 F.3d at 1137-38 (quoting *Casas*, 535 F.3d at 951). To avoid these "constitutional concerns, § 1226(c)'s mandatory language must be construed 'to contain an implicit reasonable time limitation.'" *Id.* at 1138 (quoting *Zadvydas*, 533 U.S. at 682). Accordingly, at the six-month mark, "when detention be-

comes prolonged, § 1226(c) becomes inapplicable," and "the Attorney General's detention authority rests with § 1226(a)." *Id.* (citation omitted). Under *Casas*, those detainees are then entitled to a bond hearing. *See id.* (discussing *Casas*, 535 F.3d at 951).

Contrary to the government's argument, this holding is consistent with the text of § 1226(c), which requires that the government detain certain non-citizens but does not mandate such detention for any particular length of time. *See id.* at 1138-39 (The government "does not argue that reading an implicit *temporal limitation* on mandatory detention into the statute is implausible. Indeed, it could not do so, because such an argument is foreclosed by our decisions in *Tijani* and *Casas*.") (alterations in original) (citation omitted). Our holding is also consistent with the Supreme Court's decision in *Demore*, which turned on the brevity of the detention at issue. *See Demore*, 538 U.S. at 513 (holding that Congress may require detention "for the brief period necessary for [a non-citizen's] removal proceedings"); *id.* at 526 (discussing the "longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings"); *id.* at 530 n.12 (emphasizing the "very limited time of the detention at stake under § 1226(c)").

Since *Rodriguez II*, no intervening changes in the law have affected our conclusions. Neither the Supreme Court nor our Circuit has had occasion to reexamine these issues, and the Third and Sixth Circuits have not changed the positions they adopted in *Diop* and *Ly*, respectively.

See Chavez-Alvarez v. Warden, York Cnty. Prison, 783 F.3d 469, 478 (3d Cir. 2015) (finding petitioner's detention unreasonable under the *Diop* framework); *cf. Hernandez v. Prindle*, No. 15-10, 2015 WL 1636138, at *7 (E.D. Ky. Apr. 13, 2015) (citing *Ly* for the proposition that a "short" period of detention "to effectuate effective removal," "does not raise due process concerns"), *appeal dismissed* (6th Cir. 2015).

Moreover, district courts have relied on *Rodriguez II* in resolving numerous habeas petitions filed by immigration detainees. *See, e.g., Castaneda v. ICE Field Office Dir.*, No. 14-1427, 2015 WL 71584, at *2-3 (W.D. Wash. Jan. 6, 2015) (addressing whether the petitioner's bond hearing complied with the requirements of *Rodriguez II*); *Garcia-Perez v. Kane*, No. 13-01870, 2014 WL 3339794, at *2 (D. Ariz. July 8, 2014) (noting that, under *Rodriguez II*, "detention always becomes prolonged at six months," but denying a habeas petition because petitioner "has not been detained for longer than six months"); *Lopez v. Napolitano*, No. 12-01750, 2014 WL 1091336, at *4-6 (E.D. Cal. Mar. 18, 2014) (extending *Rodriguez II* to a non-citizen detained under § 1226(a) pending reinstatement of a previously issued removal order); *Franco-Gonzalez v. Holder*, No. 10-02211, 2013 WL 3674492, at *10-13 (C.D. Cal. Apr. 23, 2013) (applying *Rodriguez II* in holding that a class of non-citizens detained under §§ 1225(b), 1226, and 1231 are entitled to bond hearings after six months of detention).

Thus, *Rodriguez II* is law of the case and law of the circuit. As we recently explained, the "law of the case

doctrine" provides that "a court will generally refuse to reconsider an issue that has already been decided by the same court or a higher court in the same case." *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc), *aff'd sub nom. Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013); *see also Gonzales v. U.S. Dep't of Homeland Sec.*, 712 F.3d 1271, 1278 (9th Cir. 2013); *Bernhardt v. Los Angeles County*, 339 F.3d 920, 924 (9th Cir. 2003). Likewise, pursuant to the "'law of the circuit' rule," "a published decision of this court constitutes binding authority which 'must be followed unless and until overruled by a body competent to do so.'" *Gonzalez*, 677 F.3d at 389 n.4 (quoting *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001)); *see also United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (en banc) ("[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit. . . . ").

The "'general rule' is that our decisions 'at the preliminary injunction phase do not constitute the law of the case.'" *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1075 n.5 (9th Cir. 2015) (quoting *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. Dep't of Agric.*, 499 F.3d 1108, 1114 (9th Cir. 2007)). Because preliminary injunction decisions are often "made hastily and on less than a full record," they "may provide little guidance as to the appropriate disposition on the merits." *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1090 (9th Cir. 2013) (citations omitted); *see also S. Or. Barter Fair v. Jackson County*, 372 F.3d 1128, 1136 (9th

Cir. 2004). However, "there is an exception to the general rule for 'conclusions on pure issues of law.'" *Stormans*, 794 F.3d at 1075 n.5 (quoting *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 804-05 (9th Cir. 2011)); *see also Ranchers Cattlemen*, 499 F.3d at 1114 ("Any of our conclusions on pure issues of law, however, are binding.").

The question resolved in *Rodriguez II*—whether noncitizens subject to prolonged detention under § 1226(c) are entitled to bond hearings—is a pure question of law. We interpreted the statute by applying the canon of constitutional avoidance, and were bound to do so by our prior precedent. The decision was not made "hastily"; it provided a "fully considered appellate ruling" on the legal issues. *Ranchers Cattlemen*, 499 F.3d at 1114 (quoting 18 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4478.5 (2002)). We therefore follow *Rodriguez II* as law of the case and law of the circuit.[9]

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[9] The government's primary arguments regarding § 1226(c) are that we misconstrued *Demore* and other Supreme Court precedent, that the permanent injunction is inconsistent with the language and purpose of § 1226(c), and that bond hearings following six months of incarceration are not necessary and are an inappropriate "one size fits all" remedy. These arguments are foreclosed by *Rodriguez II*. The government also argues that any challenges to detention under § 1226(c) must be addressed through individual as-applied claims. This argument is foreclosed by *Rodriguez I*, which reversed the district court's denial of class certification.

2. The § 1225(b) Subclass

Section 1225(b) applies to "applicants for admission" who are stopped at the border or a port of entry, or who are "present in the United States" but "ha[ve] not been admitted." 8 U.S.C. § 1225(a)(1). The statute provides that asylum seekers "shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed." *Id.* § 1225(b)(1)(B)(iii)(IV). As to all other applicants for admission, the statute provides that "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained" for removal proceedings. *Id.* § 1225(b)(2)(A).

Under DHS regulations, non-citizens detained pursuant to § 1225(b) are generally not eligible for release on bond. 8 C.F.R. § 236.1(c)(2). If there are "urgent humanitarian reasons or significant public benefit[s]" at stake,[12] however, the Attorney General has discretion to temporarily parole such an individual into the United States, provided that the individual presents neither a danger nor a risk of flight. 8 U.S.C. § 1182(d)(5)(A). Because parole decisions under § 1182 are purely discretionary, they cannot be appealed to IJs or courts. This lack of review has proven especially problematic when immigration officers have denied parole based on blatant

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[12] Under this standard, detainees are eligible for parole if they have serious medical conditions, are pregnant, are juveniles who meet certain conditions, or will be witnesses in judicial, administrative, or legislative proceedings. *See* 8 C.F.R. § 212.5(b).

errors: In two separate cases identified by the petitioners, for example, officers apparently denied parole because they had confused Ethiopia with Somalia. And in a third case, an officer denied parole because he had mixed up two detainees' files.

As with § 1226(c), the government often cites § 1225(b)'s mandatory language to justify indefinite civil detention without an individualized determination as to whether the detainee would pose a danger or flight risk if released. *See, e.g.*, *Nadarajah*, 443 F.3d at 1071, 1076 (asylum seeker detained for nearly five years). Section 1225(b) subclass members have been detained for as long as 831 days, and for an average of 346 days each. These individuals apply for and receive relief from removal at very high rates: 94% apply, and of those who apply, 64% are granted relief. In illustrative cases identified by the petitioners, non-citizens fled to the United States after surviving kidnapping, torture, and murder of their family members in their home countries. Upon arrival, these individuals were detained under § 1225(b), and they remained in detention until the government granted their asylum applications hundreds of days later.

In *Rodriguez II*, we extended *Casas* and held that to avoid serious constitutional concerns, mandatory detention under § 1225(b), like mandatory detention under § 1226(c), must be construed as implicitly time-limited. *Rodriguez II*, 715 F.3d at 1144. Accordingly, "the mandatory provisions of § 1225(b) simply expire at six months, at which point the government's authority to detain the alien shifts to § 1226(a), which is discretionary and which

we have already held requires a bond hearing." *Id.* (citing *Casas*, 535 F.3d at 948).

In so holding, we recognized that many members of the § 1225(b) subclass are subject to the "entry fiction" doctrine, under which non-citizens seeking admission to the United States "may physically be allowed within its borders pending a determination of admissibility," but "are legally considered to be detained at the border and hence as never having effected entry into this country." *Id.* at 1140 (quoting *Barrera-Echevarria*, 44 F.3d at 1450). Such non-citizens therefore "enjoy very limited protections under the United States constitution." *Id.* (quoting *Barrera-Echevarria*, 44 F.3d at 1450). However, even if the majority of prolonged detentions under § 1225(b) are constitutionally permissible, "the Supreme Court has instructed that, where one possible application of a statute raises constitutional concerns, the statute as a whole should be construed through the prism of constitutional avoidance." *Id.* at 1141 (citing *Clark*, 543 U.S. at 380). Section 1225(b) applies to several categories of lawful permanent residents who are not subject to the entry fiction doctrine but may be treated as seeking admission under 8 U.S.C. § 1101(a)(13)(C). *See id.* at 1141-42.[11]

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[11] Section 1101(a)(13)(C) provides that:

> An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—

Because those persons are entitled to due process protections under the Fifth Amendment, prolonged detention without bond hearings would raise serious constitutional concerns. *See id.* at 1142-43; *see also Zadvydas*, 533 U.S. at 682 (holding that indefinite detention of a once-admitted noncitizen "would raise serious constitutional concerns"). We therefore construed the statutory scheme to require a bond hearing after six months of detention under § 1225(b). *Rodriguez II*, 715 F.3d at 1144.

The government now argues that "[d]espite years of discovery, petitioners have not identified any member of the Section 1225(b) subclass who is a [lawful permanent

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(i) has abandoned or relinquished that status,

(ii) has been absent from the United States for a continuous period in excess of 180 days,

(iii) has engaged in illegal activity after having departed the United States,

(iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,

(v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or

(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

resident]." Petitioners represent that they have found lawful permanent residents who have been detained for more than six months under § 1225(b), although their submissions do not identify any specific individuals who fit that description. The question, however, is whether "one possible application of [the] statute raises constitutional concerns." *Rodriguez II*, 715 F.3d at 1141. Because the government concedes that detention of lawful permanent residents under § 1225(b) is possible under § 1101(a)(13)(C), "the statute as a whole should be construed through the prism of constitutional avoidance." *Rodriguez II*, 715 F.3d at 1141; *see also Clark*, 543 U.S. at 380 ("It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern.").

The government also argues that lawful permanent residents treated as seeking admission are entitled to lesser due process protections than other lawful permanent residents. But the government has not provided any authority to support that proposition: The cases cited in the government's brief address *statutory and regulatory* distinctions between lawful permanent residents treated as applicants for admission and other lawful permanent residents; they do not reflect any *constitutional* distinction between those groups. *See Gonzaga-Ortega v. Holder*, 736 F.3d 795, 8014 (9th Cir. 2013) (holding that lawful permanent residents treated as applicants for admission are not entitled to counsel under 8 C.F.R.

§ 292.5(b)); *Toro-Romero v. Ashcroft*, 382 F.3d 930, 936 (9th Cir. 2004) (explaining that different statutes govern exclusion of inadmissible non-citizens and removal of deportable noncitizens); *Raya-Ledesma v. INS*, 55 F.3d 418, 420 (9th Cir. 1994) (holding that "the INS limitation of § 212 relief [from deportation] to legal permanent residents who have held that status for more than seven years" does not violate an ineligible non-citizen's equal protection rights).

Finally, the government argues that, instead of requiring bond hearings, we could avoid constitutional concerns by interpreting § 1225(b) not to apply to lawful permanent residents. This argument relies on an implausible construction of the statutes at issue. Section 1225(b) applies to "applicants for admission," and § 1101 defines six categories of lawful permanent residents as "seeking an admission into the United States for purposes of the immigration laws." 8 U.S.C. § 1101(a)(13)(C); *see also Gonzaga-Ortega*, 736 F.3d at 801 ("Ordinarily a returning [lawful permanent resident] is not treated as an 'applicant for admission.' But the statute that so provides includes six exceptions. . . . ").

The Supreme Court's decision in *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), is not to the contrary. *Chew* involved a pre-IIRIRA immigration regulation that applied to "excludable" non-citizens. *Id.* at 591 n.1. Because the regulations were silent as to whether that category included lawful permanent residents returning from voyages abroad, the Court distinguished between the "exclusion" of newly arriving non-citizens and the "ex-

pulsion" of lawful permanent residents, thereby holding that the regulation did not authorize the Attorney General to detain arriving lawful permanent residents without hearings. *Id.* at 598-99. Section 1101(a)(13)(C) forecloses an analogous construction of § 1225(b) because it provides that "applicants for admission" includes several groups of lawful permanent residents. *See* 8 U.S.C. § 1101(a)(13)(C). In any event, the government's alternative construction of § 1225(b) was never raised before the district court; the argument is therefore forfeited. *See Munns v. Kerry*, 782 F.3d 402, 412 (9th Cir. 2015); *Saldana v. Occidental Petrol. Corp.*, 774 F.3d 544, 554 (9th Cir. 2014).

Accordingly, we adhere to *Rodriguez II*'s holding regarding the § 1225(b) subclass as law of the case and law of the circuit. *See Gonzalez*, 677 F.3d at 390 n.4. The government's attempts to re-litigate *Rodriguez II* are unavailing.[12]

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[12] The government argues, among other things, that the permanent injunction entered by the district court is inconsistent with § 1225(b), DHS regulations, the political branches' plenary control of the borders, the limited constitutional protections afforded to non-citizens seeking admission to the United States, and Supreme Court precedent. The government also argues that bond hearings are unnecessary because noncitizens detained under § 1225(b) can be released on parole. We considered and rejected these arguments in *Rodriguez II*, and we decline to address them here.

The government also argues that we should reconsider the holding in *Rodriguez II* in light of new evidence, including as to the rates at which non-citizens abscond or commit crimes after release, and the efficacy of the parole process. Because *Rodriguez II* in-

3. The § 1226(a) Subclass

Section 1226(a) authorizes detention "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). The statute expressly authorizes release on "bond of at least $1,500" or "conditional parole."[13] *Id.* § 1226(a)(2). Following an initial custody determination by DHS, a non-citizen may apply for a review or redetermination by an IJ, and that decision may be appealed to the BIA. *See* 8 C.F.R. §§ 236.1, 1003.19. At these hearings, the detainee bears the burden of establishing "that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight." *Guerra*, 24 I. & N. Dec. at 38. "After an initial bond redetermination," a request for another review "shall be considered only upon a showing that the alien's circumstances have changed materially since the prior bond redetermination." 8 C.F.R. § 1003.19(e). The government has taken the position that additional time spent in

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volved pure questions of law, this new evidence is not material and does not alter our conclusions.

[13] "'[C]onditional parole' under §1226(a)(2)(B) is a 'distinct and different procedure' from 'parole' under § 1182(d)(5)(A))." *Garcia v. Holder*, 659 F.3d 1261, 1268 (9th Cir. 2011) (quoting *In re Castillo-Padilla*, 25 I. & N. Dec. 257, 258 (BIA 2010)). As discussed above, § 1182(d)(5)(A) authorizes the Attorney General to temporarily release non-citizens detained under § 1225(b) "for urgent humanitarian reasons or significant public benefit." Conditional parole under § 1226(a), by contrast, provides for release from detention if the non-citizen "would not pose a danger to property or persons" and "is likely to appear for any further proceeding." 8 C.F.R. § 236.1(c)(8).

detention is not a "changed circumstance" that entitles a detainee to a new bond hearing.

Although § 1226(a) provides for discretionary, rather than mandatory, detention and establishes a mechanism for detainees to seek release on bond, non-citizens often face prolonged detention under that section. *See, e.g.*, *Casas*, 535 F.3d at 944 (lawful permanent resident detained for seven years); *Singh*, 638 F.3d at 1203 (lawful permanent resident detained for nearly four years). In an extreme case identified by the petitioners, a non-citizen with no criminal record entered the United States on a tourist visa and affirmatively applied for asylum, withholding of removal, and relief under the Convention Against Torture shortly after that visa expired. ICE detained him throughout the ensuing proceedings before the IJ, the BIA, and the Ninth Circuit. At the time petitioners generated their report, he had been detained for 1,234 days with no definite end in sight.

The district court's decision regarding the § 1226(a) subclass was squarely controlled by our precedents. In *Casas*, we held that a non-citizen subjected to prolonged detention under § 1226(a) is entitled to a hearing to establish whether continued detention is necessary because he would pose a danger to the community or a flight risk upon release. 535 F.3d at 949-52. Since deciding *Casas*, we have repeatedly affirmed its holding. *See Cole v. Holder*, 659 F.3d 762, 769 n.7 (9th Cir. 2011); *Singh*, 638 F.3d at 1200; *Aguilar-Ramos v. Holder*, 594 F.3d 701, 704 n.3 (9th Cir. 2010); *Makaj v. Crowther*, 294 F. App'x 328,

329-30 (9th Cir. 2008) (non-precedential memorandum disposition).

The government does not contest that *Casas* is the binding law of this circuit or that individuals detained under § 1226(a) are entitled to bond hearings. Instead, the government argues that § 1226(a) affords detainees the right to request bond hearings, *see* 8 C.F.R. § 236.1, so there is no basis for requiring the government to automatically provide bond hearings after six months of detention. This argument is foreclosed by *Casas*, which held that "§ 1226(c) must be construed as *requiring* the Attorney General to provide the alien with [a bond] hearing." 535 F.3d at 951; *see also Rodriguez II*, 715 F.3d at 1135 (citing *Casas* for the proposition that under § 1226(a), "a bond hearing is required before the government may detain an alien for a 'prolonged' period"). The record evinces the importance of *Casas*'s holding on this point: Detainees, who typically have no choice but to proceed *pro se*, have limited access to legal resources, often lack English-language proficiency, and are sometimes illiterate. As a result, many class members are not aware of their right to a bond hearing and are poorly equipped to request one. Accordingly, we conclude that class members are entitled to automatic bond hearings after six months of detention. We address the other procedural requirements for these hearings in Section IV.B, *infra*.

4. The § 1231(a) Subclass

Section 1231(a) governs detention of non-citizens who have been "ordered removed." 8 U.S.C. § 1231(a). The

statute provides for mandatory detention during a ninety-day removal period. *Id.* § 1231(a)(2). Under the statute:

> The removal period begins on the latest of the following:
>
> (i) The date the order of removal becomes administratively final.
>
> (ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.
>
> (iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

Id. § 1231(a)(1)(B). The removal period may be extended beyond ninety days if a detainee "fails or refuses" to cooperate in his removal from the United States. *Id.* § 1231(a)(1)(C).

"If the alien does not leave or is not removed within the removal period," he "shall be subject to supervision," but detention is no longer mandatory. *Id.* § 1231(a)(3). Rather, the Attorney General has discretion to detain certain classes of non-citizens and to impose conditions of release on others. *Id.* § 1231(a)(3), (a)(6).[14] Before releasing a detainee, the government must conclude that

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[14] To avoid "serious constitutional concerns," we have previously "construe[d] § 1231(a)(6) as requiring an individualized bond hearing, before an immigration judge, for aliens facing prolonged detention under that provision." *Diouf II*, 634 F.3d at 1086 (quoting *Casas*, 535 F.3d at 950).

removal is "not practicable or not in the public interest," that the detainee is "non-violent" and "not likely to pose a threat to the community following release," and that the detainee "does not pose a significant flight risk" and is "not likely to violate the conditions of release." 8 C.F.R. § 241.4(e); *see also id.* § 241.4(f) (enumerating factors the review panel should "weigh[] in considering whether to recommend further detention or release of a detainee").

Here, the class is defined, in relevant part, as non-citizens who are detained "pending completion of removal proceedings, including judicial review." The class therefore by definition excludes any detainee subject to a final order of removal.

Petitioners describe the § 1231(a) subclass as individuals detained under that section who have received a stay of removal from the BIA or a court. However, if a non-citizen has received a stay of removal from the BIA pending further administrative review, then the order of removal is not yet "administratively final." 8 U.S.C. § 1231(a)(1)(B)(i). The non-citizen has not been "ordered removed," and the removal period has not begun, so § 1231(a) is inapplicable. *See Owino v. Napolitano*, 575 F.3d 952, 955 (9th Cir. 2009) ("[W]hile administrative proceedings are pending on remand, Owino will not be subject to a *final* order of removal, so § 1231 cannot apply."). Similarly, as long as a non-citizen's removal order is stayed by a court pending judicial review, that non-citizen is not subject to "the court's final order." 8 U.S.C. § 1231(a)(1)(B)(ii). In such circumstances, § 1231(a) is, again, inapplicable. *See Prieto-Romero v. Clark*, 534

F.3d 1053, 1059 (9th Cir. 2008) ("[Section] 1231(a) does not provide authority to detain an alien . . . whose removal has been stayed by a court of appeals pending its disposition of his petition for review."); *Casas*, 535 F.3d at 947 ("If an alien has filed a petition for review with this court and received a judicial stay of removal, the 'removal period' under § 1231(a) does not begin until this court 'denies the petition and withdraws the stay of removal.'") (quoting *Prieto-Romero*, 534 F.3d at 1060).[15]

Simply put, the § 1231(a) subclass does not exist. The district court's grant of summary judgment and permanent injunction are therefore reversed to the extent they pertain to individuals detained under § 1231(a).

C. Procedural Requirements

In addition to challenging the class members' entitlement to automatic bond hearings after six months of detention, the government objects to the district court's order regarding the burden and standard of proof at such hearings. The government also appeals the district court's ruling that IJs must consider alternatives to detention. Petitioners cross-appeal the district court's rulings that IJs are not required to consider the ultimate likelihood of removal, assess the total length of detention,

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[15] "Such aliens may be detained, however, pursuant to § 1226(a), which allows the Attorney General to detain any alien 'pending a decision on whether the alien is to be removed from the United States.'" *Prieto-Romero*, 534 F.3d at 1059. As noted, noncitizens subjected to prolonged detention under § 1226(a) are entitled to bond hearings. *See Casas*, 535 F.3d at 944, 949-51.

or conduct periodic hearings at six-month intervals. We address each issue in turn.

1. Burden and Standard of Proof

The government argues that the district court erred in requiring the government to justify a non-citizen's detention by clear and convincing evidence, an intermediate burden of proof that is more than a preponderance of the evidence but less than proof beyond a reasonable doubt. As we noted in *Rodriguez II*, however, we are bound by our precedent in *Singh*, which held that "the government must prove by clear and convincing evidence that an alien is a flight risk or a danger to the community to justify denial of bond at a *Casas* hearing." *Rodriguez II*, 715 F.3d at 1135 (quoting *Singh*, 638 F.3d at 1203).

In *Singh*, we explained that the "Supreme Court has repeatedly reaffirmed the principle that 'due process places a heightened burden of proof on the State in civil proceedings in which the individual interests at stake . . . are both particularly important and more substantial than mere loss of money.'" 638 F.3d at 1204 (alteration in original) (quoting *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) (criminal defendant's competence to stand trial)) (citing *Foucha*, 504 U.S. at 80 (indefinite confinement of a criminal defendant acquitted by reason of insanity); *Woodby v. INS*, 385 U.S. 276, 285 (1966) (deportation of a lawful permanent resident); *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (revocation of naturalized citizenship)). In the civil commitment context, for example, the Supreme Court has recognized "the state's interest in committing the emotionally disturbed," but has held that

"the individual's interest in not being involuntarily confined indefinitely . . . is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence." *Addington v. Texas*, 441 U.S. 418, 425-27 (1979). Drawing on this jurisprudence, *Singh* concluded that "a clear and convincing evidence standard of proof provides the appropriate level of procedural protection" in light of "the substantial liberty interest at stake." 638 F.3d at 1203-04 (citing *Addington*, 441 U.S. at 427).

The government now contends that *Singh* was wrongly decided. However, it is well established that only a full court, sitting en banc, may overrule a three-judge panel decision. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003). Right or wrong, we are bound to follow *Singh* unless intervening Supreme Court authority is to the contrary. *Id.*

2. Restrictions Short of Detention

The government also argues that the district court erred in "determin[ing] that IJs are required to consider the use of alternatives to detention in making bond determinations." As the district court's order states, however, IJs "should already be considering restrictions short of incarceration." Indeed, *Rodriguez II* affirmed a preliminary injunction that directed IJs to "release each Subclass member *on reasonable conditions of supervision, including electronic monitoring if necessary*, unless the government" satisfied its burden of justifying continued detention. 715 F.3d at 1131 (emphasis added).

The government's objections to this requirement are unpersuasive. First, the government relies on *Demore* for the proposition that the government is not required "to employ the least burdensome means" of securing immigration detainees. *Demore*, 538 U.S. at 528. But *Demore* applies only to "brief period[s]" of immigration detention. *Id.* at 513, 523. "When the period of detention becomes prolonged, 'the private interest that will be affected by the official action' is more substantial; greater procedural safeguards are therefore required." *Diouf II*, 634 F.3d at 1091 (quoting *Mathews*, 424 U.S. at 335). Further, the injunction does not require that IJs apply the least restrictive means of supervision; it merely directs them to "consider" restrictions short of detention. The IJ ultimately must decide whether any restrictions short of detention would further the government's interest in continued detention.

Second, the government argues that IJs are not empowered to impose conditions of release. However, federal regulations authorize IJs to "detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released" and to "ameliorat[e] the conditions" of release imposed by DHS. 8 C.F.R. § 1236.1(d)(1). Accordingly, if DHS detains a noncitizen, an IJ is already empowered to "ameliorat[e] the conditions" by imposing a less restrictive means of supervision than detention.[16]

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[16] The authorities the government cites provide no support for this argument. One discusses DHS officers' authority to impose conditions of release and allows IJs to "ameliorat[e] those condi-

Finally, the government argues that IJs lack the resources to engage in continuous monitoring of released individuals. However, the government fails to cite any law or evidence indicating that IJs, rather than DHS or ICE agents, would be responsible for implementing the conditions of release. Moreover, the record indicates that Congress authorized and funded an ICE alternatives-to-detention program in 2002, and DHS has operated such a program, called the Intensive Supervision and Appearance Program, since 2004. It is abundantly clear that IJs can and do[17] consider conditions of release on bond when determining whether the government's interests can be served by detention only, and we conclude that DHS will administer any such conditions, regardless of whether they are imposed by DHS in the first instance or by an IJ upon later review.

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tions," *see* 8 C.F.R. § 236.1; the other provides only that IJs may not grant relief from removal for the purpose of fulfilling the United States' treaty obligations, *see In re G-K-*, 26 I. & N. Dec. 88, 93 (BIA 2013).

[17] On September 10, 2015, the government provided us with the only transcript of a *Rodriguez* hearing in this record, which took place on April 28, 2015, and concerned a Mr. Kaene Dean. There, the IJ did consider and impose conditions of release in addition to bond, including monthly reporting to DHS and enrollment in a mental health treatment plan. From the transcript, it does not appear that the government presented any evidence that these conditions would be insufficient to prevent the risk of danger to the community, or even any evidence at all. However, the IJ's decision to release on bond a recidivist sexual offender whom the DOJ had released twice before in proceedings unrelated to this case under § 1226(a) and who had twice before violated the conditions of his release on bond is not before us. *See* October 2, 2015 Order.

3. Length of Detention and Likelihood of Removal

In their cross-appeal, petitioners argue that the district court erred in failing to require IJs to consider the length of a non-citizen's past and likely future detention and, relatedly, the likelihood of eventual removal from the United States. In our prior decisions, we have not directly addressed whether due process requires consideration of the length of future detention at bond hearings. We have noted, however, that "the due process analysis changes as 'the period of . . . confinement grows,'" and that longer detention requires more robust procedural protections. *Diouf II*, 634 F.3d at 1086 (quoting *Zadvydas*, 634 F.3d 1081). Accordingly, a noncitizen detained for one or more years is entitled to greater solicitude than a non-citizen detained for six months. Moreover, Supreme Court precedent provides that "detention incidental to removal must bear a reasonable relation to its purpose." *Tijani*, 430 F.3d at 1249 (Tashima, J., concurring) (citing *Demore*, 538 U.S. at 527; *Zadvydas*, 533 U.S. at 690). At some point, the length of detention could "become[] so egregious that it can no longer be said to be 'reasonably related' to an alien's removal." *Id.* (citation omitted). An IJ therefore must consider the length of time for which a noncitizen has already been detained.

As to the likely duration of future detention and the likelihood of eventual removal, however, those factors are too speculative and too dependent upon the merits of the detainee's claims for us to require IJs to consider during a bond hearing. We therefore affirm the district court's ruling that consideration of those factors "would require

legal and political analyses beyond what would otherwise be considered at a bond hearing" and is therefore not appropriate. We note that *Zadvydas* and its progeny require consideration of the likelihood of removal in particular circumstances,[18] but we decline to require such analysis as a threshold inquiry in all bond hearings.

4. Periodic Hearings

The record shows that many class members are detained well beyond the six-month mark: Almost half remain in detention at the twelve-month mark, one in five at eighteen months, and one in ten at twenty-four months. Petitioners argue that due process requires additional bond hearings at six-month intervals for class members who are detained for more than six months after their initial bond hearings. We have not had occasion to address this issue in our previous decisions, and it has been a source of some contention in the district courts. *See, e.g.*, *Vivorakit v. Holder*, No. 14-04515, 2015 WL 4593545, at *4 (N.D. Cal. July 30, 2015); *Castaneda v. Aitken*, No. 15-01635, 2015 WL 3882755, at *10 (N.D. Cal. June 23, 2015).

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[18] Several of our cases have addressed petitions for habeas relief under *Zadvydas*, which requires a detainee to prove that he "is not significantly likely to be removed." *Owino*, 575 F.3d at 955; *see also Diouf v. Mukasey* (*Diouf I*), 542 F.3d 1222, 1233 (9th Cir. 2008); *Prieto-Romero*, 534 F.3d at 1065; *Nadarajah*, 443 F.3d at 1080. Those decisions instruct IJs to consider the likelihood of removal when, for instance, a detainee is stateless. *See Owino*, 575 F.3d at 955-56. However, petitioners have not identified, and we have not found, authority that supports requiring this inquiry in all bond hearings.

The district court here did not address this proposed requirement. For the same reasons the IJ must consider the length of past detention, we hold that the government must provide periodic bond hearings every six months so that noncitizens may challenge their continued detention as "the period of . . . confinement grows." *Diouf II*, 634 F.3d at 1091 (quoting *Zadvydas*, 533 U.S. at 701).

V. Conclusion

This decision flows from the Supreme Court's and our own precedent bearing on the constitutional implications of our government's prolonged civil detention of individuals, many of whom have the legal right to live and work in our country. By upholding the district court's order that Immigration Judges must hold bond hearings for certain detained individuals, we are not ordering Immigration Judges to release any single individual; rather we are affirming a minimal procedural safeguard—a hearing at which the government bears only an intermediate burden of proof in demonstrating danger to the community or risk of flight—to ensure that after a lengthy period of detention, the government continues to have a legitimate interest in the further deprivation of an individual's liberty. Immigration Judges, a specialized and experienced group within the Department of Justice, are already entrusted to make these determinations, and need not release any individual they find presents a danger to the community or a flight risk after hearing and weighing the evidence. Accordingly, we affirm all aspects of the district court's permanent injunction, with three exceptions: We reverse as to the § 1231(a) subclass, and we hold that IJs must consider the length of

detention and provide bond hearings every six months. We hereby remand to the district court to enter a revised injunction consistent with our instructions.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12-56734

ALEJANDRO RODRIGUEZ; ABDIRIZAK ADEN FARAH; JOSE FARIAS CORNEJO; YUSSUF ABDIKADIR; ABEL PEREZ RUELAS, FOR THEMSELVES AND ON BEHALF OF A CLASS OF SIMILARLY-SITUATED INDIVIDUALS, PETITIONERS-APPELLEES

AND

EFREN OROZCO, PETITIONER

v.

TIMOTHY ROBBINS, FIELD OFFICE DIRECTOR, LOS ANGELES DISTRICT, IMMIGRATION AND CUSTOMS ENFORCEMENT; JANET NAPOLITANO, SECRETARY HOMELAND SECURITY; ERIC H. HOLDER, JR., ATTORNEY GENERAL; WESLEY LEE, ASSISTANT FIELD OFFICE DIRECTOR, IMMIGRATION AND CUSTOMS ENFORCEMENT; RODNEY PENNER, CAPTAIN, MIRA LOMA DETENTION CENTER; SANDRA HUTCHENS, SHERIFF OF ORANGE COUNTY; OFFICER NGUYEN, OFFICER-IN-CHARGE, THEO LACY FACILITY; CAPTAIN DAVIS NIGHSWONGER, COMMANDER, THEO LACY FACILITY; CAPTAIN MIKE KREUGER, OPERATIONS MANAGER, JAMES A. MUSICK FACILITY; ARTHUR EDWARDS, OFFICER-IN-CHARGE, SANTA ANA CITY JAIL; RUSSELL DAVIS, JAIL ADMINISTRATOR, SANTA ANA CITY JAIL; JUAN P. OSUNA, DIRECTOR, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, RESPONDENTS-APPELLANTS

Argued and Submitted: Mar. 4, 2013
Filed: Apr. 16, 2013

OPINION

Before: KIM MCLANE WARDLAW AND RONALD M. GOULD, Circuit Judges AND SAM E. HADDON, District Judge*

WARDLAW, Circuit Judge:

Alejandro Rodriguez, Abdirizak Aden Farah, Jose Farias Cornejo, Yussuf Abdikadir, and Abel Perez Ruelas ("Appellees") are the named plaintiffs representing a certified class of non-citizens who challenge their prolonged detention, pursuant to certain federal immigration statutes, without individualized bond hearings and determinations to justify their continued detention.[1] The district court entered a preliminary injunction requiring the government to identify all

* The Honorable Sam E. Haddon, District Judge for the U.S. District Court for the District of Montana, sitting by designation.

[1] The class consists of: all non-citizens within the Central District of California who:

> (1) are or were detained for longer than six months pursuant to one of the general immigration detention statutes pending completion of removal proceedings, including judicial review, (2) are not and have not been detained pursuant to a national security detention statute, and (3) have not been afforded a hearing to determine whether their detention is justified.

class members detained pursuant to 8 U.S.C. §§ 1226(c) and 1225(b) (the "1226(c) subclass" and "1225(b) subclass," respectively), and to "provide each of them with a bond hearing before an Immigration Judge with power to grant their release." Under the preliminary injunction, at the conclusion of each bond hearing, the Immigration Judge ("IJ") "shall release each Subclass member on reasonable conditions of supervision, including electronic monitoring if necessary, unless the government shows by clear and convincing evidence that continued detention is justified based on his or her danger to the community or risk of flight."[2] The government appeals that order, and we affirm.

I.

At any given time, thousands of immigrants to the United States are detained while they await the conclusion of administrative and judicial proceedings that will determine whether they may remain in this country. According to the most recently available statistics, over 429,000 detainees were held by U.S. Immigration and Customs Enforcement ("ICE") over the

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[2] The district court entered its order on September 13, 2012. Thereafter, a panel of our court stayed the injunction for 30 days, giving the government until November 12, 2012 to comply with the preliminary injunction. At oral argument, government counsel represented that, since bond hearings began in mid-November of 2012, about 400 hearings have been conducted under the district court's order. Government counsel stated that about two-thirds of those hearings resulted in the release of the alien on bond.

course of fiscal year 2011; on average, over 33,000 were detained on any given day.[3] As of late 2011, the Los Angeles Field Office of ICE oversaw the detention of over 2,000 aliens, the great majority of whom were not subject to a final order of removal. *Id.* at 1.

This appeal concerns individuals detained in southern California for six months or longer under one of two federal immigration statutes. Section 1226(c) of Title 8 of the United States Code ("Section 1226(c)" or "§ 1226(c)") subjects certain aliens who are deportable or inadmissible on account of their criminal history to mandatory detention pending proceedings to remove them from the United States.[4] If an ICE official

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[3] U.S. Immigration and Customs Enforcement, Enforcement and Removal Operations Facts and Statistics 3 (2011), *available at* http://www.ice.gov/doclib/foia/reports/erofacts-and-statistics.pdf.

[4] Mandatory detention under Section 1226(c) applies to aliens who are inadmissible on account of having committed a crime involving moral turpitude or a controlled substance offense, on account of having multiple criminal convictions with an aggregate sentence of five years or more of confinement, on account of connections to drug trafficking, prostitution, money laundering, or human trafficking, on account of having carried out severe violations of religious freedom while serving as a foreign government official, or on account of having been involved in serious criminal activity and asserting immunity from prosecution; aliens who are deportable on account of having been convicted of two or more crimes involving moral turpitude, an aggravated felony, a controlled substance offense, certain firearm-related offenses, or certain other miscellaneous crimes; aliens who are deportable on account of having committed a crime of moral turpitude within a certain amount of time since their date of admission for which a

determines that an individual's criminal history triggers application of § 1226(c), the alien is processed for detention. If the relevant ICE official is unsure whether § 1226(c) applies to a certain individual, he may consult an ICE attorney who is "embedded" in the field office. Detainees are permitted to ask an Immigration Judge to reconsider the applicability of mandatory detention, *see* 8 C.F.R. § 1003.19(h)(2)(ii), but such review is limited in scope and addresses only whether the individual's criminal history falls within the statute's purview. *See generally In re Joseph*, 22 I. & N. Dec. 799 (B.I.A. 1999).

Section 1225(b) of Title 8 ("Section 1225(b)" or "§ 1225(b)"), the other statute at issue here, applies to "applicants for admission," such as those apprehended at the border or at a port of entry. The statute provides that "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained" for removal proceedings. 8 U.S.C. § 1225(b)(2)(A); *see also* 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (providing for mandatory detention of asylum seekers "pending a final determination of credible fear of persecution and, if found not to

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sentence of one year or longer has been imposed; and aliens who are inadmissible or deportable because of connections to terrorism. *See* 8 U.S.C. § 1226(c) (cross-referencing 8 U.S.C. §§ 1182(a)(2), 1227(a)(2)(A)(ii), 1227(a)(2)(A)(iii), 1227(a)(2)(B), 1227(a)(2)(C), 1227(a)(2)(D), 1227(a)(2)(A)(i), 1182(a)(3)(B), 1227(a)(4)(B)).

have such a fear, until removed."). Although Section 1225(b) generally mandates the detention of aliens seeking admission pending their removal proceedings, individuals detained under the statute may be eligible for discretionary parole from ICE custody. *See* 8 U.S.C. § 1182(d)(5)(A).[5] In the Central District of California, detainees are notified that they will be reviewed for parole and are asked to fill out a questionnaire and to submit to an interview with ICE officers to probe their suitability for parole. The agency considers the alien's potential dangerousness and criminal history, as well as flight risk, in making parole determinations. If a detainee is denied parole, he or she is notified orally and by a written form on which the explanation for the denial is conveyed through a checked box. Before the district court entered the preliminary injunction, parole was the only possible

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[5] Section 1182(d)(5)(A) provides:

> The Attorney General may, except as provided in subparagraph (B) or in section 1184(f) of this title, in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

release mechanism available to most 1225(b) subclass members.

Appellees argue that prolonged mandatory detention under these statutes without any possibility for review of the government's justification for their imprisonment by a neutral arbiter would raise grave constitutional concerns. Thus, relying on a related series of our decisions, Appellees requested a preliminary injunction guaranteeing them, when their detention exceeds six months in duration, an individualized determination of whether their continued detention is necessitated by any flight risk or possible danger to the community. The government argues that both statutes unambiguously require mandatory detention with no limit on the duration of imprisonment and that the Supreme Court has repeatedly affirmed the federal government's constitutional and statutory authority to require such detention. We agree with the district court that, based on our precedent, the canon of constitutional avoidance requires us to construe the government's statutory mandatory detention authority under Section 1226(c) and Section 1225(b) as limited to a six-month period, subject to a finding of flight risk or dangerousness.

II.

"The district court's grant of a preliminary injunction is reviewed for abuse of discretion and should be reversed if the district court based its decision on an erroneous legal standard or on clearly erroneous find-

ings of fact." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009) (internal quotation marks omitted). "The district court's interpretation of the underlying legal principles, however, is subject to de novo review." *Id.* An overbroad injunction is an abuse of discretion. *Id.*

III.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). To determine whether the district court abused its discretion in entering the preliminary injunction, then, we consider in turn: (1) Appellees' likelihood of success on the merits; (2) whether they have established a likelihood of irreparable harm; (3) the balance of equities; and (4) where the public interest lies.[6]

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[6] The government suggests that Federal Rule of Civil Procedure 52(a) requires us to reverse and remand because the district court failed to make explicit findings of fact and conclusions of law in its order. Rule 52(a) directs that "the court must find the facts specially and state its conclusions of law separately." While in general "[a] district court must set forth findings of fact and conclusions of law supporting an order granting an injunction," we have held that "failure to comply with Rule 52(a) does not require reversal unless a full understanding of the question is not possible without the aid of separate findings." *FTC v. Enforma Natural*

A. Likelihood of Success on the Merits

Appellees claim that the federal immigration detention statutes must be construed to require "rigorous bond hearings" for members of the 1226(c) and 1225(b) subclasses. They urge that, because prolonged mandatory detention without a bond hearing would raise grave constitutional concerns, we must read the statutes in a way that permits the possibility of release on review by a neutral decision- maker. It is "a cardinal principle" of statutory interpretation that, "if a serious doubt of constitutionality is raised" by one possible construction of a statute, we must "ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62, 52 S. Ct. 285, 76 L. Ed. 598 (1932). "The canon favoring constructions of statutes to avoid constitutional questions does not, however, license a court to usurp the policy-making and legislative functions of

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Prods., Inc., 362 F.3d 1204, 1212 (9th Cir. 2004). In general, we will remand only "where a district court's findings and conclusions supporting the preliminary injunction are not sufficient to permit meaningful review." *Id.* Here, by virtue of Appellees' membership in the subclasses at issue, the relevant facts are inherently undisputed: Each Appellee has been held for at least six months under one of the pertinent immigration detention statutes without an opportunity to contest his detention in a bond hearing. As the government concedes, "[t]his case presents, at its core, a question of statutory and constitutional interpretation that does not turn on the facts of any individual Petitioner." The government offers no reason why meaningful review is not possible on the current record.

duly-elected representatives." *Heckler v. Mathews*, 465 U.S. 728, 741, 104 S. Ct. 1387, 79 L. Ed. 2d 646 (1984). Our task is therefore to determine whether the government's reading of Sections 1226(c) and 1225(b) raises constitutional concerns and, if so, whether an alternative construction is plausible without overriding the legislative intent of Congress.

We begin with the premise that "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001). Thus, the Supreme Court has held that the indefinite detention of a once- admitted alien "would raise serious constitutional concerns." *Id.* at 682, 121 S. Ct. 2491. However, the Supreme Court has also expressed a "longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings." *Demore v. Kim*, 538 U.S. 510, 526, 123 S. Ct. 1708, 155 L. Ed. 2d 724 (2003). We therefore must determine whether the government's authority to mandatorily detain aliens under Sections 1226(c) and 1225(b) for prolonged periods raises the constitutional concerns identified by the Supreme Court in *Zadvydas*, or whether such detention is consistent with *Demore* and, thereby, permissible.

These are not entirely new questions for our court. As noted by the previous panel that reversed the district court's denial of class certification, in a series of

decisions since 2001, "the Supreme Court and this court have grappled in piece-meal fashion with whether the various immigration detention statutes may authorize indefinite or prolonged detention of detainees and, if so, may do so without providing a bond hearing." *Rodriguez v. Hayes* (*Rodriguez I*), 591 F.3d 1105, 1114 (9th Cir. 2010). After *Zadvydas* and *Demore*, we held in *Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005), that the detention under § 1226(c) of a lawfully admitted resident alien subject to removal for over 32 months was "constitutionally doubtful." *Id.* at 1242 ("Despite the substantial powers that Congress may exercise in regard to aliens, it is constitutionally doubtful that Congress may authorize imprisonment of this duration for lawfully admitted resident aliens who are subject to removal."). "To avoid deciding the constitutional issue, we interpret[ed] the authority conferred by § 1226(c) as applying to expedited removal of criminal aliens" and held that "[t]wo years and eight months of process is not expeditious." *Id.* Thus, we remanded Tijani's petition to the district court with directions to grant a writ of habeas corpus unless the government provided a bail hearing within 60 days. *Id.*

We expanded on this reasoning in *Casas-Castrillon v. Department of Homeland Security* (*Casas*), 535 F.3d 942 (9th Cir. 2008). In *Casas*, a lawful permanent resident ("LPR") who had been detained for seven years sought habeas relief while his petition for review of his removal order was pending before this court. *Id.* at

944-45. We interpreted *Demore* to hold "that § 1226(c) was intended only to 'govern[ ] detention of deportable criminal aliens pending their removal proceedings,' which the Court emphasized typically 'lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal' his removal order to the BIA." *Id.* at 948 (alteration in original) (quoting *Demore*, 538 U.S. at 527-28, 530, 123 S. Ct. 1708) (emphasis omitted). Concluding that § 1226(c) applies during only administrative removal proceedings (i.e., up until the BIA dismisses an alien's appeal but not during the pendency of judicial review), we held "that Casas' detention was authorized during this period [while he awaited judicial review] under the Attorney General's general, discretionary detention authority under § 1226(a)."[7] *Id.* In other words, § 1226(c)'s manda-

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[7] Section 1226(a) provides:

> On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) of this Section and pending such decision, the Attorney General—
>
> (1) may continue to detain the arrested alien; and
>
> (2) may release the alien on—
>
> (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or
>
> (B) conditional parole; but

tory detention provisions apply only until the BIA affirms a removal order, at which point the government's authority to detain the alien shifts to § 1226(a), where it remains until "we have rejected his final petition for review or his time to seek such review expires." *Id.*

Having concluded that Casas' continued detention was "authorized" under § 1226(a), we observed that "[t]here is a difference between detention being authorized and being necessary as to any particular person," and thus held "that the government may not detain a legal permanent resident such as Casas for a prolonged period without providing him a neutral forum in which to contest the necessity of his continued detention." *Id.* at 949. We further noted that while "[t]he Supreme Court upheld § 1226(c)'s mandatory detention provision in *Demore*, [it] did so with the specific understanding that § 1226(c) authorized mandatory detention only for the 'limited period of [the alien's] removal proceedings,'" which the Court emphasized was brief. *Id.* at 950 (alteration in original) (quoting *Demore*, 538 U.S. at 530, 123 S. Ct. 1708). Because *Demore*'s holding hinged on the brevity of mandatory detention, we concluded in Casas that "pro-

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(3) may not provide the alien with work authorization

(including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

longed detention of aliens is permissible only where the Attorney General finds such detention individually necessary by providing the alien with an adequate opportunity to contest the necessity of his detention." *Id.* at 951. We thus held that, under § 1226(a)'s discretionary detention regime, a bond hearing is required before the government may detain an alien for a "prolonged" period. *Id.*

Two questions left unanswered by our opinion in *Casas*—the procedural requirements for bond hearings under *Casas* and the precise definition of "prolonged" detention—have been answered in more recent opinions. First, in *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011), we provided guidance to immigration officials as to the procedures required at a *Casas* hearing. With regard to the appropriate burden of proof, we held that, "[g]iven the substantial liberty interest at stake . . . the government must prove by clear and convincing evidence that an alien is a flight risk or a danger to the community to justify denial of bond at a Casas hearing." *Singh*, 638 F.3d at 1203. We further held that, in considering whether the government has proven dangerousness, IJs should consider the factors identified in *In re Guerra*, 24 I. & N. Dec. 37 (B.I.A.2006), which include the extensiveness of an alien's criminal record, the recency of his criminal activity, and the seriousness of his offenses. *Singh*, 638 F.3d at 1206 (citing *Guerra*, 24 I. & N. Dec. at 40). We also held that "due process requires a contemporaneous record of Casas hearings," such as a

transcript or an audio recording available upon request. *Id.* at 1208.

Second, in *Diouf v. Napolitano* (*Diouf II*), 634 F.3d 1081 (9th Cir. 2011), we addressed the definition of "prolonged" detention for purposes of the Casas bond hearing requirement. *Diouf II* first extended the holding of Casas to aliens discretionarily detained under 8 U.S.C. § 1231(a)(6).[8] *Id.* at 1086. Rejecting the government's proferred bases for distinguishing Casas, *see id.*, we held that "an alien facing prolonged detention under § 1231(a)(6) is entitled to a bond hearing before an immigration judge and is entitled to be released from detention unless the government establishes that the alien poses a risk of flight or a danger to the community." *Id.* at 1092. Importantly, we indicated that an "alien's continuing detention becomes prolonged" at the 180- day mark. *Id.* at 1091.

> When detention crosses the six-month threshold and release or removal is not imminent, the private interests at stake are profound. Furthermore, the risk of an erroneous deprivation of liberty in the

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[8] Section 1231(a)(6) permits the continued detention, beyond the 90-day statutory removal period that begins when a removal order becomes final, of "inadmissible aliens, criminal aliens, aliens who have violated their nonimmigrant status conditions, and aliens removable for certain national security or foreign relations reasons, as well as any alien 'who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal.'" *Zadvydas*, 533 U.S. at 688, 121 S. Ct. 2491 (quoting 8 U.S.C. § 1231(a)(6)).

> absence of a hearing before a neutral decisionmaker is substantial. The burden imposed on the government by requiring hearings before an immigration judge at this stage of the proceedings is therefore a reasonable one.

Id. at 1091-92.

With this precedent in mind, we address Appellees' likelihood of success on the merits. Because the legal considerations applicable to the 1226(c) and 1225(b) subclasses differ in some respects, we separately analyze Appellees' likelihood of success with respect to each subclass.

1. The 1226(c) subclass.

In addressing Section 1226(c), we do not write on a blank slate. In *Demore*, an LPR who conceded deportability as an aggravated felon raised a due process challenge to his mandatory detention under § 1226(c). *Demore*, 538 U.S. at 517-18, 523, 123 S. Ct. 1708. The Supreme Court first reviewed at some length Congress's stated reasons for mandating detention of the aliens to whom Section 1226(c) applies, emphasizing concerns about flight and recidivism under the prior regime. *Id.* at 518-21, 123 S. Ct. 1708. Ultimately, the *Demore* majority held that the government was not required to provide individualized determinations of an alien's dangerousness or flight risk to detain him during his removal proceedings. *See id.* at 523-25, 123 S. Ct. 1708. Noting that the *Zadvydas* Court had already held that the government's authority to detain

an alien indefinitely pending removal would be constitutionally doubtful, the *Demore* majority distinguished *Zadvydas* on two principal grounds. *Id.* at 527, 123 S. Ct. 1708 (citing *Zadvydas*, 533 U.S. at 699, 121 S. Ct. 2491). First, while in *Zadvydas* the petitioners challenged their indefinite detention under circumstances where removal was not practicable, thus undermining the government's interest in preventing flight, *see id.* (citing *Zadvydas*, 533 U.S. at 690, 121 S. Ct. 2491), detention under Section 1226(c) "necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." *Id.* at 528, 123 S. Ct. 1708. Second, *Demore* emphasized that unlike the detention at issue in *Zadvydas*, which had no clear termination point, Section 1226(c) applies only during the pendency of removal proceedings and thus has an inherent end point—the conclusion of proceedings:

> Under § 1226(c), not only does detention have a definite termination point, in the majority of cases it lasts for less than the 90 days we considered presumptively valid in *Zadvydas*. The Executive Office for Immigration Review has calculated that, in 85% of the cases in which aliens are detained pursuant to § 1226(c), removal proceedings are completed in an average time of 47 days and a median of 30 days. . . . In the remaining 15% of cases, in which the alien appeals the decision of the Immi-

> gration Judge to the Board of Immigration Appeals, appeal takes an average of four months, with a median time that is slightly shorter.

Id. at 529, 123 S. Ct. 1708 (footnote and citations omitted). The Court thus upheld mandatory detention under § 1226(c), though the concurring opinion of Justice Kennedy—whose vote created a majority—noted that "a lawful permanent resident alien such as respondent could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified." *Id.* at 532, 123 S. Ct. 1708 (Kennedy, J., concurring) (citing *Zadvydas*, 533 U.S. at 684-86, 121 S. Ct. 2491).

We have addressed the question of how broadly *Demore* sweeps in several decisions over the past decade. On each of these occasions, we have consistently held that *Demore*'s holding is limited to detentions of brief duration. *See, e.g., Casas*, 535 F.3d at 950 ("References to the brevity of mandatory detention under § 1226(c) run throughout *Demore*."); *Tijani*, 430 F.3d at 1242 (similar); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1081 (9th Cir. 2006) ("In *Demore*, the Court grounded its holding by referencing a 'brief period' . . . of 'temporary confinement'. . . . There is no indication anywhere in *Demore* that the Court would countenance an indefinite detention.") (citations omitted). We are by no means the only court to interpret *Demore* in this way. For instance, in *Diop v. ICE/Homeland Security*, 656 F.3d 221 (3d Cir. 2011), the

Third Circuit construed *Demore*, in light of Justice Kennedy's concurrence, as recognizing that "the constitutionality of [mandatory detention] is a function of the length of the detention." *Id.* at 232 ("At a certain point, continued detention becomes unreasonable and the Executive Branch's implementation of § 1226(c) becomes unconstitutional unless the Government has justified its actions at a hearing inquiring into whether continued detention is consistent with the law's purposes of preventing flight and dangers to the community."); *see also Ly v. Hansen*, 351 F.3d 263, 271 (6th Cir. 2003) ("[T]he Court's discussion in Kim is undergirded by reasoning relying on the fact that *Kim*, and persons like him, will normally have their proceedings completed within . . . a short period of time and will actually be deported, or will be released. That is not the case here.").

Thus, it is clear that while mandatory detention under § 1226(c) is not constitutionally impermissible *per se*, the statute cannot be read to authorize mandatory detention of criminal aliens with no limit on the duration of imprisonment. As we held in *Casas*, "the prolonged detention of an alien without an individualized determination of his dangerousness or flight risk would be constitutionally doubtful." 535 F.3d at 951 (internal quotation marks omitted). Consistent with our previous decisions, we conclude that, to avoid constitutional concerns, § 1226(c)'s mandatory language must be construed "to contain an implicit 'reasonable time' limitation, the application of which is subject to

federal-court review." *Zadvydas*, 533 U.S. at 682, 121 S. Ct. 2491.

The government relies heavily on *Demore* in advancing several arguments that the entry of the preliminary injunction was improper, but none is ultimately persuasive. First, the government directs us to the statutory history of § 1226(c), arguing that by enacting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Congress intentionally undid provisions of the 1990 and 1991 amendments to the Immigration and Nationality Act ("INA") that previously granted some discretion to the Attorney General to release criminal aliens pending removal. The government cites *Demore*'s observation that Congress's enactment of § 1226(c) hinged on its determination that the flight of aliens released pending removal proceedings, and crimes perpetrated with frequency by those who absconded under the prior regime, were undermining national immigration policy. *See Demore*, 538 U.S. at 518-19, 123 S. Ct. 1708. Moreover, the government argues that the statute's use of the mandatory "shall" plainly contemplates mandatory detention without a bond hearing. It notes that § 1226(a), which was enacted contemporaneously with § 1226(c), uses discretionary language and that § 1226(c)(2) provides for narrow exceptions to mandatory detention for criminal aliens who materially assist law enforcement. These statutes, the government contends, indicate that Congress knew how to provide for release on bond if it wished to do so. Fin-

ally, the government argues that under *Zadvydas* and *Demore*, mandatory detention under 1226(c) without a bond hearing is permissible because such detention has a definite termination point.

We are not convinced by the government's reasoning, which relies on a broad reading of *Demore* foreclosed by our post-*Demore* cases. Despite the Supreme Court's holding that mandatory detention under § 1226(c) without an individualized determination of dangerousness or flight risk is constitutional under some circumstances, our subsequent decisions applying *Demore* make clear that *Demore*'s reach is limited to relatively brief periods of detention. *See Casas*, 535 F.3d at 951. Nothing about the district court's preliminary injunction order requires reading the mandatory detention requirement out of § 1226(c), because "the mandatory, bureaucratic detention of aliens under § 1226(c) was intended to apply for only a limited time," after which "the Attorney General's detention authority rests with § 1226(a)." *Id.* at 948. In other words, the preliminary injunction does not require that anyone held under § 1226(c) receive a bond hearing. Rather, under a fair reading of our precedent, when detention becomes prolonged, § 1226(c) becomes inapplicable. "As a general matter, detention is prolonged when it has lasted six months and is expected to continue more than minimally beyond six months." *Diouf II*, 634 F.3d at 1092 n.13. Therefore, subclass members who have been detained under § 1226(c) for six months are entitled to a bond

hearing because the applicable *statutory* law, not constitutional law, requires one. Thus, while the government may be correct that reading § 1226(c) as anything other than a mandatory detention statute is not a "plausible interpretation[ ] of [the] statutory text," *Clark v. Martinez*, 543 U.S. 371, 381, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005), it does not argue that reading an implicit *temporal limitation* on mandatory detention into the statute is implausible. Indeed, it could not do so, because such an argument is foreclosed by our decisions in *Tijani* and *Casas*.

The government's attempts to distinguish our post-*Demore* authority are unavailing. It is certainly true, as the government notes, that by its terms *Casas* concerned an alien who had received an administratively final removal order, sought judicial review, and obtained a remand to the BIA; thus, it did not expressly apply to aliens awaiting the conclusion of their initial administrative proceedings. But this seems to us a distinction without a difference, and the government does not present a persuasive reason why the same protections recognized in *Casas* should not apply to pre-removal order detainees. "Regardless of the stage of the proceedings, the same important interest is at stake—freedom from prolonged detention." *Diouf II*, 634 F.3d at 1087. Indeed, if anything, because LPRs detained prior to the entry of an administratively final removal order have not been adjudicated removable, they would seem to have a *greater* liberty interest than individuals detained pending judicial

review or the pendency of a motion to reopen before the agency, and thus a greater entitlement to a bond hearing. *See id.* at 1086-87 (suggesting that a detainee who is subject to a final order of removal may have a "lesser liberty interest in freedom from detention").

The government is likewise correct that *Diouf II* by its terms addressed detention under § 1231(a)(6), not § 1226(c) or § 1225(b). But *Diouf II* strongly suggested that immigration detention becomes prolonged at the six-month mark regardless of the authorizing statute. *See, e.g., id.* at 1091-92 ("When detention crosses the six-month threshold and release or removal is not imminent, the private interests at stake are profound."). Even if *Diouf II* does not squarely hold that detention always becomes prolonged at six months, that conclusion is consistent with the reasoning of *Zadvydas*, *Demore*, *Casas* and *Diouf II*, and we so hold.

The government's remaining argument against what it calls "a six-month blanket rule" is that such a rule would be contrary to the decisions of other circuits and to the principle that due process inherently must be determined through case-by-case adjudication. Neither contention is compelling. First, the government cites the Sixth Circuit's decision in *Ly*, 351 F.3d at 271-73, and the Third Circuit's decision in *Diop*, 656 F.3d at 234, both of which declined to establish a brightline time limit on detention without a bond hearing. But both *Diop* and *Ly* held that there are

substantive limits on the length of detention under § 1226(c), and those cases are thus contrary to the government's position that *Demore* permits mandatory detention under § 1226(c) irrespective of duration. To the extent *Diop* and *Ly* reject a categorical time limit, their reasoning in that respect is inapplicable here, both because this petition is a class action (and thus relief will perforce apply to all detainees) and because we already indicated in *Diouf II* that detention is presumptively prolonged when it surpasses six months in duration. More fundamentally, the preliminary injunction does not, as the government claims, "embrace an inflexible blanket approach to due process analysis." Rather, the injunction requires individualized decision-making—in the form of bond hearings that conform to the procedural requirements set forth in Singh. Thus, the 1226(c) subclass members are likely to succeed on the merits.

2. The 1225(b) subclass.

We next address whether the prolonged detention of "applicants for admission" under Section 1225(b) raises the same "serious constitutional concerns" that are implicated by prolonged detention of other detained aliens. The government argues that the 1225(b) subclass members enjoy lesser constitutional protections than other detained aliens. Of course, if the statute does not raise constitutional concerns, then there is no basis for employing the canon of constitutional avoidance. *See Ma v. Ashcroft*, 257 F.3d 1095, 1106-07 (9th Cir. 2001).

The government emphasizes the "unique constitutional position of arriving aliens" to argue that prolonged detention of 1225(b) subclass members does not implicate constitutional concerns. This argument relies principally on *Shaughnessy v. United States ex rel. Mezei* (*Mezei*), 345 U.S. 206, 73 S. Ct. 625, 97 L. Ed. 956 (1953) and *Barrera-Echavarria v. Rison*, 44 F.3d 1441 (9th Cir. 1995) (en banc), *superseded by statute as stated in Xi v. I.N.S.*, 298 F.3d 832, 837-38 (9th Cir. 2002). In *Mezei*, the Supreme Court rejected a constitutional challenge to the multi-year detention on Ellis Island of an LPR returning from a 19-month trip abroad. *See* 345 U.S. at 214, 73 S. Ct. 625. Adverting to the now-defunct statutory distinction between "exclusion" and "deportation" proceedings, the Court held that:

> [A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. . . . But an alien on the threshold of initial entry stands on a different footing: Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.

Id. at 212, 73 S. Ct. 625 (internal quotation marks and citations omitted). In *Barrera-Echavarria*, we applied *Mezei* to uphold the constitutionality of prolonged detention of excludable aliens under the pre-IIRIRA version of 8 U.S.C. § 1226(e). 44 F.3d at 1448. We held that the "entry fiction" doctrine, as

explained by the Supreme Court, "squarely precludes a conclusion that [excludable aliens] have a constitutional right to be free from detention, even for an extended time." *Id.* at 1449.

It seems clear that many, if not most, members of the 1225(b) subclass would fall into the category of aliens described in *Mezei* and *Barrera-Echavarria* as entitled to limited due process protection. *See Barrera-Echavarria*, 44 F.3d at 1450 ("*Mezei* established what is known as the 'entry fiction,' which provides that although *aliens seeking admission into the United States* may physically be allowed within its borders pending a determination of admissibility, such aliens are legally considered to be detained at the border and hence as never having effected entry into this country. . . . Noncitizens who are outside United States territories enjoy very limited protections under the United States Constitution.") (emphasis added) (internal quotations and citations omitted). Nonetheless, we have reason to question whether *Mezei* and *Barrera-Echavarria* are squarely apposite to the inquiry before us.

First, both cases were decided under pre-IIRIRA law. Because the cases apply to the former category of "excludable aliens," it is not clear that the class of aliens to whom *Mezei* and *Barrera-Echavarria* applied is coextensive with the 1225(b) subclass in this case. As we explained in *Xi*:

> The INA is no longer denominated in terms of "entry" and "exclusion." IIRIRA replaced these terms with the broader concept of "admission." Section 1101(a)(13), which formerly defined "entry" as "any coming of an alien into the United States, from a foreign port or place . . . ," 8 U.S.C. [§] 1101(a)(13) (1994), now defines "admission" to mean "the lawful entry of [an] alien into the United States after inspection and authorization by an immigration officer," 8 U.S.C. [§] 1101(a)(13)(A) (2002). Concomitantly, IIRIRA dropped the concept of "excludability" and now uses the defined term of "inadmissibility." Although the grounds for being deemed inadmissible are similar to those for being deemed excludable, *compare* 8 U.S.C. § 1182 (1994) *with* 8 U.S.C. § 1182 (2002), there are substantial differences between the two statutes.

298 F.3d at 838. Of course, this does not undermine *Barrera-Echavarria*'s reasoning as it relates to aliens in the 1225(b) subclass to whom the entry fiction clearly applies (likely the vast majority). But the Supreme Court has instructed that, where one possible application of a statute raises constitutional concerns, the statute as a whole should be construed through the prism of constitutional avoidance. *See Clark*, 543 U.S. at 380, 125 S. Ct. 716 (2005) ("It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must

govern."). Thus, the dispositive question is not whether the government's reading of § 1225(b) is permissible in some (or even most) cases, but rather whether there is any single application of the statute that calls for a limiting construction.[9]

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[9] At oral argument, government counsel contended that the district court record is devoid of any evidence suggesting that members of the 1225(b) subclass include returning LPRs. This argument reveals a fundamental misunderstanding of class actions litigated under Rule 23(b)(2) of the Federal Rules of Civil Procedure, including this one. *See Rodriguez I*, 591 F.3d at 1125-26. "The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" *Wal-Mart Stores, Inc. v. Dukes*, — U.S. —, 131 S. Ct. 2541, 2557, 180 L. Ed. 2d 374 (2011) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). It would be illogical for us to conclude that the government's reading of the statute is permissible just because, by happenstance, there are currently no detainees in the Central District who possess the requisite constitutional status to render ICE's preferred practice illegal. Nor could we countenance such a result in light of the Supreme Court's admonition that, "when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark*, 543 U.S. at 380-81, 125 S. Ct. 716. In other words, if the canon of constitutional avoidance requires us to read the statute such that bond hearings are available to individuals who have been detained for six months, then under Clark such hearings must be available to everyone detained under the statute.

Under current law, § 1225(b) applies to some LPRs returning from abroad who have *not* been absent for the prolonged period described in *Mezei*. *See* 8 U.S.C. § 1101(a)(13)(C) (setting forth six categories of LPRs who may be treated as seeking admission, only one of which relates to prolonged absences from U.S. territory).[10] "It is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within

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[10] Section 1101(a)(13)(C) provides:

> An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—
>
> (i) has abandoned or relinquished that status,
>
> (ii) has been absent from the United States for a continuous period in excess of 180 days,
>
> (iii) has engaged in illegal activity after having departed the United States,
>
> (iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,
>
> (v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or
>
> (vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

the protection of the Fifth Amendment," and an LPR whose absence is not prolonged is assimilated to that same constitutional status. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596, 73 S. Ct. 472, 97 L. Ed. 576 (1953). For instance, an LPR who left the United States briefly to undertake illegal activity abroad, such as alien smuggling, would clearly be included in the 1225(b) subclass; under 8 U.S.C. § 1101(a)(13)(C)(iii), he would be treated as an alien seeking admission on account of having "engaged in illegal activity after having departed the United States." *See United States v. Tsai*, 282 F.3d 690, 696 & n.5 (9th Cir. 2002). But in *Landon v. Plasencia*, 459 U.S. 21, 103 S. Ct. 321, 74 L. Ed. 2d 21 (1982), the Supreme Court specifically held that an LPR arrested for alien smuggling upon return from a brief trip abroad is entitled to due process protection, specifically because *Mezei* is inapplicable in such a scenario. *See id.* at 34, 103 S. Ct. 321 (holding that *Mezei* "did not suggest that no returning resident alien has a right to due process," and that "it does not govern this case, for Plasencia was absent from the country only a few days"). As such, it is clear that the 1225(b) subclass includes at least some aliens who are not subject to the entry fiction doctrine, and thus under *Clark* the statute must be construed with these aliens in mind.[11]

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[11] This analysis also disposes of the government's reliance on *Alvarez-Garcia v. Ashcroft*, 378 F.3d 1094 (9th Cir. 2004), which involved an individual petition for review brought by an alien who entered the United States without inspection and thus clearly was

This conclusion is buttressed by the fact that the government's position is facially inconsistent with our binding holding in *Nadarajah*. *Nadarajah* concerned an asylum seeker who had been granted relief but who remained detained pending review of his case by the Attorney General. 443 F.3d at 1071-75. Although we examined Nadarajah's claims under the paradigm of *Zadvydas*, and therefore considered only the possibility of "indefinite" (as opposed to "prolonged") detention, we nonetheless held that § 1225(b) is susceptible to a saving construction to avoid constitutional concerns. *See id.* at 1076-78. While this analysis does not directly answer the central question presented by this appeal, i.e. whether bond hearings are required at the six month mark, it does undermine the government's arguments in two important respects. First, the government argues that § 1225(b) is too unambiguous for the doctrine of constitutional avoidance to apply. But it is not clear how this could be so in light of *Nadarajah*, where we have *already* applied the canon to this very statute. Second, and relatedly, the government's argument that there is no due process "floor" for the treatment of aliens subject to § 1225(b) is difficult to reconcile with a binding decision that already construed the statute expressly to avoid constitutional concerns. Thus, read together, *Plasencia*, *Clark*, and *Nadarajah* suggest that we must construe

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subject to the doctrine described in *Mezei* and *Barrera-Echavarria*. *See id.* at 1095, 1097-98.

§ 1225(b) to avoid potential constitutional concerns raised by its application to LPRs who enjoy due process protection.

With this premise in place, the likelihood of success of the 1225(b) subclass is determined by the same analysis applicable to the 1226(c) subclass, which we conclude has demonstrated a likelihood of success. To the extent our holdings in *Tijani*, *Casas*, and *Diouf II* require that we construe mandatory immigration detention authority as time-limited and that bond hearings occur when detention becomes "prolonged," there is no basis for distinguishing between the two sub-classes in this regard. Indeed, if anything it would appear that the LPRs who fall within § 1225(b)'s purview should enjoy *greater* constitutional protections than criminal aliens who have already failed to win relief in their removal proceedings, as in *Casas*. *See Johnson v. Eisentrager*, 339 U.S. 763, 770, 70 S. Ct. 936, 94 L. Ed. 1255 (1950) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.").

Appellees suggest two potential ways we could apply the canon of constitutional avoidance in construing

§ 1225(b). First, we could simply read a bond hearing requirement into the statute, as we did with regard to § 1231(a)(6) in the *Diouf* opinions. *See Diouf II*, 634 F.3d at 1089; *Diouf v. Mukasey* (*Diouf I*), 542 F.3d 1222, 1234 (9th Cir. 2008) ("We have specifically construed § 1231(a)(6) to permit release on bond.") (citing *Doan v. I.N.S.*, 311 F.3d 1160, 1162 (9th Cir. 2002)). This first suggestion, however, is problematic. For one thing, this reading would conflict with Department of Homeland Security regulations, at least as applied to some subclass members, because current regulations unambiguously strip IJs of the authority to "redetermine conditions of custody imposed by the Service with respect to" arriving aliens. *See* 8 C.F.R. § 1003.19(h)(2)(i)(B). Moreover, it is difficult to distinguish the statute's language from that of § 1226(c), which also provides that aliens who fall within its scope "shall" be detained and which the Supreme Court has characterized as mandating detention. *See Demore*, 538 U.S. at 513-14, 123 S. Ct. 1708; *compare* 8 U.S.C. § 1226(c)(1) ("The Attorney General shall take into custody any alien who. . . . "), *with id.* § 1225(b)(2)(A) ("[I]f the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained. . . . "). Appellees argue that the existence of the parole scheme itself undermines the government's mandatory construction of the statute, but § 1226(c) also contains a *statutory* exception to mandatory detention. *See* 8 U.S.C. § 1226(c)(2) ("The Attorney General may release an

alien described in paragraph (1) only if the Attorney General decides . . . that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding."). If anything, the existence of these narrow and explicit exceptions to both statutes' reach is evidence of their drafters' intent to make detention mandatory in all cases to which the exceptions are inapplicable. Thus, Appellees' first suggested construction is not a "fairly possible" reading of the statute as required for the canon of constitutional avoidance to apply.

Appellees' second suggested construction fares considerably better. Under this approach, we would simply follow *Casas* and hold that, to the extent detention under § 1225(b) is mandatory, it is implicitly time-limited. This approach fits more naturally into our case law, which has suggested that after *Demore*, brief periods of mandatory immigration detention do not raise constitutional concerns, but prolonged detention —specifically longer than six months—does. This reading also has the advantage of uniformity, which the Supreme Court has suggested is an important value in matters of statutory construction. *Cf. Zadvydas*, 533

U.S. at 680, 121 S. Ct. 2491 ("In order to limit the occasions when courts will need to make the difficult judgments called for by the recognition of this necessary Executive leeway, it is practically necessary to recognize a presumptively reasonable period of detention. . . . [F]or the sake of uniform administration in the federal courts, six months is the appropriate period."). Of course, the government's detention authority does not completely dissipate at six months; rather, the mandatory provisions of § 1225(b) simply expire at six months, at which point the government's authority to detain the alien would shift to § 1226(a), which is discretionary and which we have already held requires a bond hearing. *See Casas*, 535 F.3d at 948.

Finally, we note that the discretionary parole system available to § 1225(b) detainees is not sufficient to overcome the constitutional concerns raised by prolonged mandatory detention. Indeed, any argument to that effect is clearly foreclosed by our holding in *Singh*, which held that bond hearings must be held before a neutral IJ with the government bearing the burden of proof by clear and convincing evidence. *See* 638 F.3d at 1203-04. The parole process is purely discretionary and its results are unreviewable by IJs. *Cf. Casas*, 535 F.3d at 949 ("We hold that the government may not detain a legal permanent resident such as Casas for a prolonged period without providing him a neutral forum in which to contest the necessity of his continued detention." (emphasis added)). Moreover, release decisions are based on humanitarian consider-

ations and the public interest, *see* 8 U.S.C. § 1182(d)(5)(A), not whether the alien "is a flight risk or will be a danger to the community." *Singh*, 638 F.3d at 1203 (quoting *Casas*, 535 F.3d at 951). To the extent the principles of *Tijani*, *Casas* and *Diouf II* are applicable to the 1225(b) subclass, the constitutionally grounded hearing requirements set forth in Singh are also applicable. The government does not, and could not, contend that discretionary parole satisfies *Singh*. Thus, Appellees are likely to succeed on the merits of their claim that § 1225(b) must be construed to authorize only six months of mandatory detention, after which detention is authorized by § 1226(a) and a bond hearing is required.

B. Irreparable Harm

Having determined that Appellees are likely to succeed on the merits, we consider the remaining Winter factors. We conclude that, here too, the Winter factors favor Appellees.

Appellees clearly face irreparable harm in the absence of the preliminary injunction. "It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976)). Thus, it follows from our conclusion that the government's reading of Sections 1226(c) and 1225(b) raises serious constitutional concerns "that irreparable harm is *likely*, not just possi-

ble" in the absence of preliminary injunctive relief. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

There is no dispute that at least some individuals who would be detained if not provided a bond hearing will be granted conditional release under this injunction. Moreover, the government does not dispute that some subclass members detained under § 1225(b) and § 1226(c) will win relief from removal, further undermining any purported rationale for continued detention. Thus, the preliminary injunction is necessary to ensure that individuals whom the government cannot prove constitute a flight risk or a danger to public safety, and sometimes will not succeed in removing at all, are not needlessly detained. Appellees have therefore clearly shown a risk of irreparable harm.

C. Balance of the Equities

The government provides almost no evidence that it would be harmed in any way by the district court's order, other than its assertion that the order enjoins "presumptively lawful" government activity and is contrary to the plain meaning of the statutes. These arguments are obviously premised on the government's view of the merits because it cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required to avoid constitutional concerns. *Cf. Zepeda v. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983) ("[T]he INS cannot reasonably assert that it is harmed in any legally cognizable

sense by being enjoined from constitutional violations.").[12] Thus, in light of the major hardship posed by needless prolonged detention, we conclude that the balance of the equities favors Appellees.

D. The Public Interest

The government claims that "the government's interest is presumed to be the 'public's interest' in this case." It contends that the public interest is undermined by the heavy burden the injunction places on administrative resources and by the government's potential inability to prepare for bond hearings in time to comply with the district court's order. But the government's arguments are flawed in several respects. First, it cites *Nken v. Holder*, 556 U.S. 418, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009), for the general proposition that the public interest always mili-

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[12] The government also contends that Appellees delayed in bringing their motion for a preliminary injunction. *See Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) ("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm."). But the government identifies no prejudice that it has suffered as a result of this delay, and in any event the district court did not abuse its discretion by declining to withhold preliminary relief from a constitutionally suspect government practice on the basis that an injunction should have been requested sooner. Moreover, as Appellees point out, the government declined to seek certiorari in *Diouf II*—on which Appellees' motion relied—only in February of 2012. The parties thereafter engaged in settlement negotiations, which apparently stalled in March. Thus, Appellees' June 2012 preliminary injunction motion was not particularly belated.

tates against enjoining government practices. But *Nken* does not contain any such holding. While the Court observed that there is "always a public interest in prompt execution of removal orders," which "may be heightened by the circumstances . . . if, for example, the alien is particularly dangerous, or has substantially prolonged his stay by abusing the processes provided to him," *id.* at 436, 129 S. Ct. 1749, it did not purport to create a blanket presumption in favor of the government in all preliminary injunction cases. Moreover, the bond hearings that this injunction requires are intended to determine precisely whether each individual alien is dangerous or a flight risk and to permit the conditional release only of those who are not. By its terms, the injunction does not require the government to release anyone. Thus, *Nken* does not support the government's position.

The government's arguments regarding the resources required to implement the injunction are also not compelling. Hundreds of hearings have already occurred under the district court's order, belying any suggestion that the preliminary injunction is prohibitively burdensome. Moreover, even if the government faced severe logistical difficulties in implementing the order—a premise that Appellees dispute—they would merely represent the burdens of complying with the applicable statutes, as construed to avoid practices occasioned by an interpretation of the statutes that risks running afoul of the Constitution. "Generally, public interest concerns are implicated when a consti-

tutional right has been violated, because all citizens have a stake in upholding the Constitution." *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005). It stands to reason that the public interest also benefits from a preliminary injunction that ensures that federal statutes are construed and implemented in a manner that avoids serious constitutional questions.

IV.

Contrary to the government's rhetoric, this injunction will not flood our streets with fearsome criminals seeking to escape the force of American immigration law. The district court's narrowly tailored order provides individuals, whose right to be present in the United States remains to be decided, a hearing where a neutral decision-maker can determine whether they might deserve conditional release from the prison-like setting where they might otherwise languish for months or years on end. These hearings simply ensure that "the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana*, 406 U.S. 715, 738, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972).

"[F]reedom from physical restraint 'has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.'" *Kansas v. Hendricks*, 521 U.S. 346, 356, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997) (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992)). While ICE is entitled to carry out its

duty to enforce the mandates of Congress, it must do so in a manner consistent with our constitutional values.

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-56156

ALEJANDRO RODRIGUEZ, PETITIONER-APPELLANT

v.

JAMES HAYES, IMMIGRATION AND CUSTOMS ENFORCEMENT LOS ANGELES DISTRICT FIELD OFFICER DIRECTOR; GEORGE MOLINAR, CHIEF OF DETENTION AND REMOVAL OPERATIONS, SAN PEDRO DETENTION FACILITY; JANET NAPOLITANO*, SECRETARY, DEPARTMENT OF HOMELAND SECURITY; ERIC H. HOLDER JR., ATTORNEY GENERAL; PAUL WALTERS; LEE BACA, SHERIFF OF LOS ANGELES COUNTY; SAMMY JONES, CHIEF OF THE CUSTODY OPERATIONS DIVISION OF THE LOS ANGELES COUNTY SHERRIFF'S DEPARTMENT, RESPONDENTS-APPELLEES

Argued and Submitted: May 5, 2009
Filed: Aug. 20, 2009
Amended: Jan. 4, 2010

ORDER AND OPINION

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* Janet Napolitano is substituted for her predecessor, Michael Chertoff, as Secretary of the Department of Homeland Security, pursuant to Fed. R. App. P. 43(c)(2).

ORDER

Before: B. FLETCHER, RAYMOND C. FISHER and RONALD M. GOULD, Circuit Judges.

The opinion filed on August 20, 2009 and published at 578 F.3d 1032 (9th Cir. 2009) is hereby amended. The amended opinion is filed simultaneously with this order.

With the amendment, the panel has voted to deny the petition for panel rehearing. Judges Fisher and Gould have voted to deny the petition for rehearing en banc and Judge B. Fletcher so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35.

Accordingly, the petition for panel rehearing and the petition for rehearing en banc are denied. No further petitions for rehearing or rehearing en banc will be entertained.

OPINION

B. FLETCHER, Circuit Judge:

Petitioner Alejandro Rodriguez ("Petitioner") seeks a writ of habeas corpus on behalf of himself and a class of aliens detained in the Central District of California for more than six months without a bond hearing while engaged in immigration proceedings. Petitioner requests injunctive and declaratory relief providing individual bond hearings to all members of the class.

Petitioner appeals the district court denial without explanation of Petitioner's request to certify the proposed class. Respondents, seeking to fill the gap left by the district court's conclusory order, assert that the district court's denial was justified on any of the following grounds: 1) the proposed class is undefined; 2) the claim of Petitioner is moot; 3) the claims of the proposed class are unripe; 4) class relief is barred by 8 U.S.C. § 1252(f); 5) the court lacks jurisdiction over the claims of the proposed class in light of the holding in *Rumsfeld v. Padilla*; and 6) the proposed class does not meet the requirements of Federal Rule of Civil Procedure 23. We have jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1292. We conclude that none of the grounds offered by Respondents justify denial of class certification and that the class meets the requirements of Rule 23; accordingly, we reverse.

I. Background

Petitioner is a citizen of Mexico who came to the United States at the age of one in 1979. He became a lawful permanent resident eight years later. Petitioner was arrested in April 2004, charged with being removable based on past drug and theft convictions, and detained thereafter by the Department of Homeland Security. Petitioner contested his removability before an immigration judge ("IJ"), who determined he was subject to mandatory removal based on either of his past offenses. The Board of Immigration Appeals ("BIA") reversed the IJ's finding that Petitioner

was removable on the basis of his drug offense, but upheld the IJ's finding that his theft conviction was an aggravated felony requiring removal. Petitioner appealed the BIA's finding that his theft offense constituted an aggravated felony and we stayed his removal pending our decision. The appeal has been held in abeyance pending determination of a separate appeal to the United States Supreme Court. During his detention Petitioner received three custody reviews from Immigration and Customs Enforcement that determined to continue his detention, the latest occurring in September 2006. In conjunction with these reviews, Petitioner received no hearing or notice explaining ICE's decision beyond mention that his Ninth Circuit appeal was pending.[1]

On May 16, 2007, Petitioner filed the current Petition for Writ of Habeas Corpus against the secretaries of the Departments of Homeland Security and Justice, the field office director in the Central District of California for Immigration and Customs Enforcement ("ICE"), and the head officials of various alien detention facilities in the district ("Respondents"). Petitioner seeks relief on behalf of himself and a class of aliens in the Central District of California "who 1) are or will be detained for longer than six months pursuant to one of the general immigration detention statutes pending completion of removal proceedings, including

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[1] Petitioner also was at one point deemed eligible for release on a bond of $15,000, which Petitioner could not pay. This bond order was later revoked after the BIA determined his appeal.

judicial review, and 2) have not been afforded a hearing to determine whether their prolonged detention is justified." (Pet. for Writ of Habeas Corpus ¶ 39.) Petitioner asserts that the detention of the members of the proposed class is not authorized by statute, and, in the alternative, that if their detention is authorized it violates the Fifth Amendment's guarantee of due process. Petitioner's requested relief includes the certification of the proposed class, appointment of Petitioner's counsel as class counsel, and injunctive and declaratory relief providing all members of the class "constitutionally-adequate individual hearings before an immigration judge . . . , at which Respondents will bear the burden to prove by clear and convincing evidence that Petitioner and each class member is a sufficient danger or risk of flight to justify his detention in light of how long he has been detained already and the likelihood of his case being finally resolved in favor of the government in the reasonably foreseeable future." (Pet. for Writ of Habeas Corpus 21.)

On June 25, 2007 Petitioner filed a Motion for Class Certification, which was opposed by Respondents on the same grounds now raised in this appeal. ICE released Petitioner from detention under an order of supervision approximately a month later pursuant to 8 C.F.R. § 241.4. Respondents subsequently filed a motion to dismiss Petitioner's action on mootness grounds in light of his release.

The district court denied Petitioner's Motion for Class Certification and the Respondents' Motion to

Dismiss on March 19, 2008 in a two-sentence order. Petitioner filed the current appeal of the denial of class certification on July 17, 2008.

II. Standard of Review

We review a district court's decision to deny class certification for abuse of discretion. *Zinser v. Accufix Research Inst.*, 253 F.3d 1180, 1186 (9th Cir. 2001), *amended*, 273 F.3d 1266 (9th Cir. 2001). However, a district court's decision as to class certification is not afforded the "'traditional deference'" when it is not "supported by sufficient findings." *Molski v. Gleich*, 318 F.3d 937, 946 (9th Cir. 2003) (quoting *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1161 (9th Cir. 2001)). Here, where the district court made no findings whatsoever in support of its denial of class certification, but the record before us is sufficiently developed, "we may evaluate for ourselves" whether the class should be certified. *Las Vegas Sands*, 244 F.3d at 1161.[2] Respondents contend that we should afford the full deference normally accorded the district court's order on the basis that its findings and reasoning can be derived implicitly from Respondents' opposition to class certification filed below. Respondents, however, offered multiple reasons for denying class certification. We would be engaging in mere guess-

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[2] We do not opine on the appropriate course for the reviewing court when a district court makes some, but insufficient, findings, justifying its class certification determination, as that is not the posture we face here.

work were we to assume the district court relied on any particular reason or reasons. We, therefore, follow *Las Vegas Sands* in reviewing the district court's determination.

III. Definition of Proposed Class

Petitioner seeks to certify a class of detainees who are held pursuant to what Petitioner labels the "general immigration statutes." Respondents assert that Petitioner's use of the phrase "general immigration statutes" creates an undefined class. While not a model of clarity, Petitioner's habeas corpus petition and request for class certification together indicate that "general immigration statutes" refers narrowly to 8 U.S.C. § 1226, 8 U.S.C. § 1225(b), and 8 U.S.C. § 1231(a). Whether 8 U.S.C. § 1182(d)(5)(A) is also included in the definition is ambiguous, as it is only referenced in Petitioner's subsequent filings. This is of no practical importance, however, as Section 1182(d)(5)(A) merely provides for discretionary parole of detainees, which, upon revocation, returns the detainees to the form of legal detention they were in prior to parole. 8 U.S.C. § 1182(d)(5); *see Clark v. Martinez*, 543 U.S. 371, 385-86, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005) (discussing effect of Section 1182(d)(5) on detention status). Hence, we conclude Petitioner's proposed class is adequately defined for certification.

IV. Immigration Detention Statutes

The three immigration detention statutes implicated by the proposed class govern detention of aliens at

different stages of the admission and removal process. 8 U.S.C. § 1225(b) provides for discretionary detention of aliens pending a determination of admissibility.[3] 8 U.S.C. § 1226 provides for both discretionary detention generally and mandatory detention for certain narrow categories of aliens pending a determination of their removability.[4] 8 U.S.C. § 1231(a) provides for manda-

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[3] 8 U.S.C. § 1225(b)(1)(B)(ii) provides:

> If the [asylum] officer determines at the time of the interview [upon arrival in the United States] that an alien has a credible fear of persecution . . . , the alien shall be detained for further consideration of the application for asylum.

8 U.S.C. § 1225(b)(2)(A) provides:

> [I]n the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.

[4] 8 U.S.C. § 1226(a) provides:

> On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.

8 U.S.C. § 1226(c) provides:

> The Attorney General shall take into custody any alien who . . . is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title, . . . is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title, . . . is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[sic] to a term of imprisonment of at least 1 year, or . . . is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title, when the al-

tory detention of aliens ordered removed during the 90 day removal period and discretionary detention after the end of the removal period.[5] Petitioner's request for relief raises the question of whether prolonged detention without a bond hearing is authorized under any of these statutes and, in the alternative, even if it

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ien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

[5] 8 U.S.C. § 1231(a)(2) provides:

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

8 U.S.C. § 1231(a)(6) provides:

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. § 1231(a)(1)(C) provides:

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

is authorized, whether such detention is constitutional. These are not new questions for this court. In a series of decisions, the Supreme Court and this court have grappled in piece-meal fashion with whether the various immigration detention statutes may authorize indefinite or prolonged detention of detainees and, if so, may do so without providing a bond hearing. Each decision has undertaken interpretation of the immigration detention statutes against the backdrop of the serious constitutional issues raised by indefinite or prolonged detention. We review these decisions to provide the necessary context to aid in determining the appropriateness of class relief.

A. Discretionary Detention

In *Zadvydas v. Davis*, 533 U.S. 678, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001), the Supreme Court first took up the question of whether an immigration discretionary detention statute authorized indefinite or prolonged detention. The alien there was detained pursuant to Section 1231(a)(6), authorizing discretionary detention of aliens after the removal period. The Court held that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem." *Id.* at 690. The Court found Section 1231(a)(6) ambiguous as to whether it authorized indefinite detention and, therefore, "interpreting the statute to avoid a serious constitutional threat, . . . conclude[d] that, once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute." *Id.* at 699. The Court determined

that for six months following the beginning of the removal period an alien's detention was presumptively authorized. *Id.* at 701. However, after that period, "once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing" in order to continue to detain the alien. *Id.* Though *Zadvydas* dealt only with aliens detained pursuant to Section 1231(a)(6) who were removable under Section 1227(a)(1)(C), 1227(a)(2) or 1227(a)(4), the Supreme Court subsequently extended its holding to the other two categories of aliens governed by the statute: aliens inadmissible under Section 1182 and aliens determined by the Secretary of Homeland Security to be a risk to the community or a flight risk. *See Clark*, 543 U.S. at 378, 125 S. Ct. 716; *see also Xi v. INS*, 298 F.3d 832, 834 (9th Cir. 2002). We have further extended the *Zadvydas* framework to discretionary detention pursuant to Section 1225(b) and 1226(a), finding that indefinite detention under these statutes poses the same constitutional concerns present in *Zadvydas*. *See Prieto-Romero v. Clark*, 534 F.3d 1053, 1062-63 (9th Cir. 2008); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1078-80 (9th Cir. 2006).

Having applied the *Zadvydas* framework to determine when prolonged discretionary detention is authorized, we have also begun to determine what sort of bond hearing, if any, is needed to justify prolonged discretionary detention for individual petitioners. As we stated in *Prieto-Romero*, even when detention is

authorized by statute, "due process requires 'adequate procedural protections' to ensure that the government's asserted justification for physical confinement 'out-weighs the individual's constitutionally protected interest in avoiding physical restraint.'" 534 F.3d at 1065 (quoting *Zadvydas*, 533 U.S. at 690-91, 121 S. Ct. 2491). In *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 949-52 (9th Cir. 2008), we determined that Section 1226(a) authorized detention of the petitioner at issue and proceeded to discuss what bond hearing, if any, he was entitled to. We concluded that Section 1226(a) provided authority for the Attorney General to release an alien detained under the section on bond following a bond hearing. *Id.* "Because the prolonged detention of an alien without an individualized determination of his dangerousness or flight risk would be 'constitutionally doubtful,'" we further concluded "that § 1226(a) must be construed as requiring the Attorney General to provide the alien with such a hearing." *Id.* (emphasis omitted). Hence, we held that an alien detained under Section 1226(a) "is entitled to release on bond unless the government establishes that he is a flight risk or will be a danger to the community." *Id.* at 951 (internal quotation marks omitted); *see also Flores-Torres v. Mukasey*, 548 F.3d 708, 709 n.2 (9th Cir. 2008); *Prieto-Romero*, 534 F.3d at 1065-66 (finding three bond hearings for Section 1226(a) detainee satisfied due process); *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005) (finding alien detained for nearly three years could not be mandatorily detained under Section 1226(c) and ordering bond

hearing, impliedly finding alien was detained under Section 1226(a)).

In *Diouf v. Mukasey*, 542 F.3d 1222 (9th Cir. 2008), by contrast, we refused to reach the issue of whether a bond hearing was required under Section 1231(a)(6). We held the detention of the petitioner at issue beyond the six month period was authorized under Section 1231(a)(6). *Id.* at 1233. We then turned to the issue of what bond hearing, if any, the petitioner was entitled to for determining the necessity of his detention. We concluded that while release on bond was clearly authorized by Section 1231(a)(6) and its implementing regulations, it was unclear whether a bond hearing was required under the statute for petitioner and what burden if any should be placed on the government at such a hearing. *Id.* at 1234-35. Because the district court had not had an opportunity to reach this question, we declined to reach it in the first instance and remanded. *Id.* at 1235. However, in doing so we noted that the issue was "somewhat similar" to that in *Casas-Castrillon*, strongly implying that the district court's determination should at least be informed by its reasoning. *Diouf*, 542 F.3d at 1234-35.

B. Mandatory Detention

We have also dealt with indefinite or prolonged detention under immigration mandatory detention provisions, including Sections 1226(c), 1231(a)(2), and 1231(a)(1)(c). Section 1226(c) provides for mandatory detention of criminal aliens for expedited removal. The Supreme Court has held that detention pursuant

to Section 1226(c) does not raise any due process concerns. *Demore v. Kim*, 538 U.S. 510, 531, 123 S. Ct. 1708, 155 L. Ed. 2d 724 (2003). However, in upholding Section 1226(c), the Court interpreted it to authorize mandatory detention only for the "limited period of [the alien's] removal proceedings," which the Court estimated "lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal" his removal order to the BIA. *Id.* at 530-31, 123 S. Ct. 1708. We have subsequently clarified that, in order to avoid the serious constitutional questions raised by indefinite mandatory detention, detention of an alien beyond an expedited period ceases to be mandatory under Section 1226(c) and instead becomes discretionary under Section 1226(a). *See Casas-Castrillon*, 535 F.3d at 951; *Tijani*, 430 F.3d at 1242.

We have additionally held that detention pursuant to Section 1231(a)(2) poses no due process issues, regardless of whether removal of the detained alien is foreseeable, because the statute authorizes detention for only the ninety-day removal period and therefore does not create any danger of unconstitutionally indefinite detention. *Khotesouvan v. Morones*, 386 F.3d 1298, 1299-1301 (9th Cir. 2004). We have taken the same view when an alien is detained pursuant to the related provision of 8 U.S.C. § 1231(a)(1)(C), which allows the removal period to be extended and detention to continue beyond ninety days if an alien conspires or acts to prevent his own removal. *Pelich*

v. INS, 329 F.3d 1057, 1058-61 (9th Cir. 2003). The court, while "expressly declin[ing] to endorse or reject any inferred *Zadvydas*-inspired limitation to § 1231(a)(1)(C)" found that, in any case, "an alien cannot assert a viable constitutional claim when his indefinite detention is due to his failure to cooperate with the INS's efforts to remove him." *Id.* at 1060-61; *see also Lema v. INS*, 341 F.3d 853, 857 (9th Cir. 2003) ("We conclude that 8 U.S.C. § 1231(a)(1)(C) . . . authorizes the INS's continued detention of a removable alien so long as the alien fails to cooperate fully and honestly with officials to obtain travel documents.") Key to this determination was the court's view that "[t]he risk of indefinite detention that motivated the Supreme Court's statutory interpretation in *Zadvydas* does not exist when an alien is the cause of his own detention." *Pelich*, 329 F.3d at 1060.

V. Alleged Bars to Class Relief

Petitioner seeks to end our piecemeal rulings in habeas actions on the necessity of bond hearings to justify prolonged detention in the immigration context and have the courts address the issue on a class-wide basis across the various general immigration detention statutes. While "ordinarily disfavored," the Ninth Circuit has recognized that class actions may be brought pursuant to habeas corpus. *Cox v. McCarthy*, 829 F.2d 800, 804 (9th Cir. 1987); *see also Mead v. Parker*, 464 F.2d 1108, 1112-13 (9th Cir. 1972) (finding habeas relief to be appropriate in cases "where the relief sought can be of immediate benefit to a large and amorphous group"). Respondents assert, nonethe-

less, that various constitutional, statutory, and procedural bars to class relief exist in this case.

A. Mootness

Respondents initially challenge class certification on the ground that Petitioner's individual claim has been rendered moot by his release from detention. In fact, mootness of the Petitioner's claim is not a basis for denial of class certification, but rather is a basis for dismissal of Petitioner's action. Because the district court did not dismiss Petitioner's action, but only denied class certification, we see no reason to conclude it based its denial on a finding of mootness. If it had made such a finding, it would have been in error. Petitioner was released pursuant to 8 C.F.R. § 241.4, which provides that "[t]he Executive Associate Commissioner shall have authority, in the exercise of discretion, to revoke release and return to Service custody an alien previously approved for release under the procedures in this section." 8 C.F.R. § 241.4(*l*)(2). While the regulation provides the detainee some opportunity to respond to the reasons for revocation, it provides no other procedural and no meaningful substantive limit on this exercise of discretion as it allows revocation "when, in the opinion of the revoking official . . . [t]he purposes of release have been served . . . [or][t]he conduct of the alien, or *any other circumstance*, indicates that release would no longer be appropriate." *Id.* § 241.4(*l*)(2)(i), (iv) (emphasis added). This places Petitioner in a position analogous to the petitioner challenging his prolonged detention in

Clark v. Martinez, who was released from detention pursuant to a discretionary parole provision while his suit was ongoing. The Supreme Court found his case was not mooted:

> If Benitez is correct, as his suit contends, that the Government lacks the authority to continue to detain him, he would have to be released, and could not be taken back into custody unless he violated the conditions of . . . or his detention became necessary to effectuate his removal. . . . His current release, however, is not only limited to one year, *but subject to the Secretary's discretionary authority to terminate.* . . . Thus, Benitez continue[s] to have a personal stake in the outcome of his petition.

Clark, 543 U.S. at 376 n.3, 125 S. Ct. 716 (citations and internal quotation marks omitted) (emphasis added). Petitioner asserts that the government cannot detain him unless it can demonstrate by clear and convincing evidence at a hearing before an immigration judge that he is a sufficient danger or flight risk to justify his detention. If Petitioner is successful in his petition he would be entitled to such a hearing where the government would need to meet its burden or offer him a nondiscretionary release until such time as it can make the requisite showing or has an independent statutory basis to detain him. This would place Petitioner in a far different situation from his current one, released pursuant to the government's independent determination but subject to revocation on the government's

discretion without hearing before a neutral decision-maker and without burden of justification on the government. Hence, like the petitioner in *Clark*, Petitioner here retains a personal stake in the determination of his claim such that it is not moot.

We further note that Petitioner's current release is subject to a number of restrictions, including the requirements that he remain within 50 feet of his home from 7:00 p.m. to 7:00 a.m. every night and wear an ankle monitoring device at all times. Petitioner proposes that he receive a bond hearing to determine not only whether he should be released, but also under what conditions such release would take place. The strict limitations on Petitioner's freedom, therefore, provide an additional reason why his case presents a live controversy. *Cf. Carafas v. LaVallee*, 391 U.S. 234, 238, 88 S. Ct. 1556, 20 L. Ed. 2d 554 (1968) (holding that when habeas petitioner was released from custody, but his felony conviction prevented him from engaging in certain businesses, voting, and serving on juries, underlying habeas case still presented live controversy).

B. Ripeness

Respondents additionally argue that class certification must be denied because the claims of the proposed class are not all yet ripe.[6] "[A] claim is not ripe for

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[6] Respondents assert that Petitioner waived any challenge to their ripeness argument by not raising it in his opening brief. This argument is groundless. We have previously held that the failure of a party in its opening brief to challenge an alternate

adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Bova v. City of Medford*, 564 F.3d 1093, 1096 (9th Cir. 2009) (internal quotation marks omitted). Respondents first argue that the claims of proposed class members detained pursuant to Section 1226(a) are unripe because there is no indication yet that the government is refusing to comply with *Casas-Castrillon*'s ruling. This argument rests on a misunderstanding of what constitutes membership in the proposed class. Members of the proposed class are by definition aliens who have been detained without a bond hearing. If an alien who would otherwise be a member of the class receives a bond hearing pursuant to *Casas-Castrillon* or any other ruling they would cease to be a member of the class. Hence, the government's full compliance with *Casas-Castrillon* could reduce the size of the class, but it could not render the claims of class members unripe. Respondents additionally argue that the proposed class suffers from ripeness issues because it references future class members. The inclusion of future class members in a class is not itself unusual or objectionable. *See, e.g.*,

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ground for a district court's ruling *given by the district court* waives that challenge. *See United States v. Kama*, 394 F.3d 1236, 1238 (9th Cir. 2005); *MacKay v. Pfeil*, 827 F.2d 540, 542 n.2 (9th Cir. 1987). Here, the district court did not cite ripeness or any other rationale for its denial of certification. Petitioner does not waive a challenge to any ground for denial of certification in its opening brief on appeal that was not relied on in the district court's order.

Probe v. State Teachers' Ret. Sys., 780 F.2d 776, 780 (9th Cir. 1986); *LaDuke v. Nelson*, 762 F.2d 1318, 1321-26 (9th Cir. 1985). When the future persons referenced become members of the class, their claims will necessarily be ripe. Hence, we conclude that the requirement of ripeness raises no bar to certification of the class.

C. 8 U.S.C. § 1252(f)

Respondents assert that 8 U.S.C. § 1252(f)(1), Section 306(a) of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), bars class certification in this case.[7]

Section 1252(f)(1) provides:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this sub-chapter, as amended by [IIRIRA], other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

8 U.S.C. § 1252(f)(1). Part IV includes 8 U.S.C. §§ 1221-1231. *See Catholic Soc. Servs., Inc. v. INS*, 232 F.3d 1139, 1150 (9th Cir. 2000) (en banc). Respondents argue that Section 1252(f) bars the pro-

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[7] We expand our explanation of our disagreement with Respondents to more fully respond to its petition for rehearing.

posed class from receiving any injunctive relief, thereby requiring denial of class certification.

Respondents are doubly mistaken. Section 1252(f) cannot bar certification of the class unless it bars the proposed class from receiving any class relief. It is simply not the case that Section 1252(f) bars Petitioner from receiving declaratory relief on behalf of the class. The Supreme Court has recognized as much: "By its plain terms, and even by its title, [Section 1252(f)] is nothing more or less than a limit on injunctive relief. It prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1231, but specifies that this ban does not extend to individual cases." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481-482, 119 S. Ct. 936, 142 L. Ed. 2d 940 (9th Cir. 1999).

Nor do we agree with Respondents that Section 1252(f)'s "enjoin or restrain" should be interpreted to have the same scope as a different phrase, "enjoin, suspend or restrain," in the Tax Injunction and Johnson Acts, 28 U.S.C. §§ 1341 and 1342. "[E]njoin," "suspend," and "restrain" should each be read to have independent operative meaning, and the conspicuous absence of "suspend" suggests that Congress intended Section 1252(f)'s scope to be more limited than the Tax Injunction and Johnson Acts. *See California v. Grace Brethren Church*, 457 U.S. 393, 408, 102 S. Ct. 2498, 73 L. Ed. 2d 93 (1982) (holding that the Tax Injunction Act prohibits both declaratory and injunctive relief because declaratory relief "may in every practical

sense operate to *suspend* collection of state taxes until the litigation has ended" (emphasis added)). The term "restrain" need not encompass declaratory relief in order to have a meaning independent from "enjoin." We follow the First Circuit in concluding that "restrain" in Section 1252(f) is best read to refer to temporary injunctive relief. *See Arevalo v. Ashcroft*, 344 F.3d 1, 7 (1st Cir. 2003) ("The most sensible way to give operative effect to both words in this statutory scheme is to treat the word 'enjoin' as referring to permanent injunctions and the word 'restrain' as referring to temporary injunctive relief. . . . ").

But it is the text of the IIRIRA itself that most clearly shows that Section 1252(f) was not meant to bar classwide declaratory relief. Congress knew how to say "declaratory relief" in enacting the IIRIRA, but it chose not to use it in Section 1252(f). *Cf.* 8 U.S.C. § 1252(e)(1)(A) (prohibiting courts from entering "declaratory, injunctive, or other equitable relief" in any action to exclude under 8 U.S.C. § 1225(b)(1)). "[E]njoin or restrain" should not be read to include declaratory relief when Congress could easily have included "declaratory relief" explicitly had it chosen to do so. *Cf. Hor v. Gonzales*, 400 F.3d 482, 484 (7th Cir. 2005) ("Our legal vocabulary contains distinct words for distinctive judicial actions. Keeping them separate makes it easy to address one, both, or neither, in a statute such as the IIRIRA.").

Respondents protest, however, that declaratory relief is as a practical matter equivalent to injunctive

relief, and that allowing classwide declaratory relief allows an "end run" around the scheme Congress designed. The first problem with this argument is that declaratory relief has long been recognized as distinct in purpose from and "milder" in remedy than injunctions. *Steffel v. Thompson*, 415 U.S. 452, 466-67, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974). Unlike injunctions, declaratory judgments do not impose affirmative obligations that are backed by a contempt sanction. *Id.* at 471, 94 S. Ct. 1209. The second problem with Respondents' "end run" argument is that litigants under Section 1252(f) *already have* an end run around the injunction prohibition: filing individual lawsuits. The issue is not whether declaratory relief might make possible an end run around Section 1252(f), but whether classwide declaratory relief is a congressionally contemplated part of the statutory scheme. As we have explained, we believe that it is.

In addition, we conclude that Section 1252(f) does not bar injunctive relief for the proposed class. Section 1252(f) prohibits only injunction of "the operation of" the detention statutes, not injunction of a violation of the statutes. This is a distinction we have made before in a decision vacated on unrelated grounds. *See Ali v. Ashcroft*, 346 F.3d 873, 886 (9th Cir. 2003), *vacated on unrelated grounds sub nom. Ali v. Gonzales*, 421 F.3d 795 (9th Cir. 2005). We held there:

> "[Section] 1252(f)(1) limits the district court's authority to enjoin the INS from carrying out legitimate removal orders. Where, however, a peti-

> tioner seeks to enjoin conduct that allegedly is not even authorized by the statute, the court is not enjoining the operation of part IV of subchapter II, and § 1252(f)(1) therefore is not implicated."

Id. Analogously, Petitioner here does not seek to enjoin the operation of the immigration detention statutes, but to enjoin conduct it asserts is not authorized by the statutes. Petitioner argues only that the immigration detention statutes, to the extent they cannot be interpreted as requiring provision of a bond hearing, must be enjoined as unconstitutional. However, as this latter argument for relief may never be reached, it cannot be a basis for denial of class certification.

The reasoning of *Ali* is bolstered by a long established canon of statutory interpretation. Because equitable powers are an inherent part of the "judicial power" committed to the federal courts by Article III, *see Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 460, 462, 15 L. Ed. 449 (1855), traditional equitable powers can be curtailed only by an unmistakable legislative command. *See, e.g., Porter v. Warner Holding Co.*, 328 U.S. 395, 398, 66 S. Ct. 1086, 90 L. Ed. 1332 (1946) ("Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."). It is hardly a "necessary and inescapable inference" from the language of Section 1252(f) that a

district court is prohibited from enjoining a violation or misapplication of the detention statutes.

Respondents assert that we should not adopt the reasoning of the vacated opinion in *Ali*, but instead follow our decision in *Catholic Soc. Servs., Inc. v. INS*, 182 F.3d 1053 (9th Cir. 1999), *aff'd in part and rev'd in part en banc*, 232 F.3d 1139 (9th Cir. 2000). There we found that injunctive relief for a class asserting that the INS misinterpreted legalization provisions of the Immigration Control and Reform Act was barred by Section 1252(f). We stated:

> [R]egardless of the fact that the injunction provides relief for a harm ostensibly created by the INS' misinterpretation of the legalization provisions of part V, insofar as it would interfere with the operation of part IV, the injunction here is contrary to the plain language of § 1252(f) and the district court lacked the jurisdiction to enter it.

Id. at 1062. We subsequently reversed this conclusion on en banc review, however, on the basis that the ordered injunction was issued under part V of the subchapter, rather than part IV and, therefore, not within the terms of Section 1252(f). *Catholic Soc. Servs.*, 232 F.3d at 1150. Were we nonetheless to accept the panel's reasoning as persuasive, it would not control here. The requested injunction at issue does not seek to enjoin the operation of Part IV provisions to relieve harm caused by misinterpretation of other statutory provisions, but to enjoin conduct alleged not to be authorized by the proper operation of

Part IV provisions. The sound reasoning of *Ali* persuades that this is not barred by the plain terms of Section 1252(f).[8]

D. Rumsfeld v. Padilla

Finally, Respondents claim that the Supreme Court's holding in *Rumsfeld v. Padilla*, 542 U.S. 426, 124 S. Ct. 2711, 159 L. Ed. 2d 513 (2004), renders class action relief inappropriate in this case. In *Padilla*, the Supreme Court stated that "longstanding practice confirms that in habeas challenges to present physical confinement-'core challenges'-the default rule is that the proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official." *Id.* at 435, 124 S. Ct. 2711. Respondents argue that this statement mandates that the proper respondents for members of the proposed class are the various wardens overseeing their individual custody. Respondents assert that this renders class relief impossible because, "at a jurisdictional minimum," all proposed class members must be under the immediate supervision of the same custodian. (Resp'ts Answering Br. 16.) Respondents fail to recognize that *Padilla* specifically reserved the question of whether the

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[8] Petitioner additionally argues that Section 1252(f) properly interpreted does not apply to claims for habeas relief at all. We do not reach this argument at this time, as it is sufficient to find that the district court may in some scenario grant the proposed class some of the relief sought to determine that the class may be certified.

proper respondent in habeas challenges brought by "an alien detained pending deportation" would be the immediate custodian of the alien. *Padilla*, 542 U.S. at 436 n.8, 124 S. Ct. 2711. We need not reach it because, even were the Supreme Court's statement in *Padilla* applicable here, Respondents' argument is baseless. Respondents cite no authority or rationale for the proposition that we do not have jurisdiction to provide class relief in a habeas corpus action that meets the requirements for certification merely because class members are in the immediate custody of different facilities. Such actions have been maintained previously against single and multiple respondents. *See Schall v. Martin*, 467 U.S. 253, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984) (class of juveniles sought habeas corpus relief from pretrial detention under state law); *U.S. ex rel. Sero v. Preiser*, 506 F.2d 1115 (2d Cir. 1974) (class of young adults sought habeas corpus relief from serving terms in state reformatories). Regardless of who the proper respondents for the class are, we conclude certification of the class will not pose any jurisdictional concerns.

VI. Rule 23

In addition to raising various bars to class relief, Respondents assert that the proposed class fails to comply with the requirements of Federal Rule of Civil Procedure 23, governing class certification. Rule 23(a) provides that a class may be certified only if:

> (1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). The party seeking certification must meet all of these requirements and Rule 23(b) further provides that for certification the class must fall into one of three categories. *Zinser*, 253 F.3d at 1186 ("[T]he party seeking class certification . . . bears the burden of demonstrating that she has met each of the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b)."). Petitioner seeks certification under the category provided for in Rule 23(b)(2), which requires that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Respondents challenge the proposed class's compliance with all aspects of Rule 23 except the numerosity requirement, which Respondents concede is met. We discuss the proposed class's compliance with the remaining requirements individually.

A. Commonality

The commonality requirement "serves chiefly two purposes: (1) ensuring that absentee members are

fairly and adequately represented; and (2) ensuring practical and efficient case management." *Walters v. Reno*, 145 F.3d 1032, 1045 (9th Cir. 1998). We have construed this requirement "permissively." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). It is not necessary that "[a]ll questions of fact and law . . . be common to satisfy the rule." *Id.* We have found "[t]he existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Id.*; *see, e.g.*, *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) ("The commonality requirement is met if plaintiffs' grievances share a common question of law or of fact."); *Baby Neal for & by Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994) ("The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class."). Nor does "common" as used in Rule 23(a)(1) mean "complete congruence." *In re First Alliance Mortg. Co.*, 471 F.3d 977, 990 (9th Cir. 2006). We find the claims of the class share sufficiently common questions of law to meet the requirement of Rule 23(a)(1).

Respondents challenge the commonality of class members' claims on the ground that class members suffer detention for different reasons and under the authority of different statutes. Respondents assert that, as a result, the question of whether individual class members' detention may be continued without a bond hearing turns on divergent questions of statutory interpretation and consideration of different factual

circumstances. Respondents are undoubtedly correct that members of the proposed class do not share every fact in common or completely identical legal issues. This is not required by Rule 23(a)(1). Instead, the commonality requirements asks us to look only for some shared legal issue or a common core of facts. This the proposed members of the class certainly have. In each case in which we have interpreted the scope of various statutes providing for both discretionary and mandatory detention in the immigration context, our determinations have been guided, if not controlled, by the question of whether indefinite or prolonged detention generating serious constitutional concerns is present. A form of that question is posed here: may an individual be detained for over six months without a bond hearing under a statute that does not explicitly authorize detention for longer than that time without generating serious constitutional concerns? This question will be posed by the detention of every member of the class and their entitlement to a bond hearing will largely be determined by its answer. *See Casas-Castrillon*, 535 F.3d at 951 ("Because the prolonged detention of an alien without an individualized determination of his dangerousness or flight risk would be 'constitutionally doubtful,' we hold that § 1226(a) must be construed as requiring the Attorney General to provide the alien with such a hearing." (emphasis omitted)); *Tijani*, 430 F.3d at 1242 (interpreting statutory framework to provide bond hearing because "it is constitutionally doubtful that Congress may authorize imprisonment of this duration for lawfully admitted

resident aliens who are subject to removal."). The nature of the particular statute authorizing the detention of individual class members will play some role in determining whether class members are entitled to relief, as well. Nonetheless, the constitutional issue at the heart of each class member's claim for relief is common.

We also note that a finding of commonality here serves the purposes of the requirement. Answering comprehensively in a class setting the constitutional question that is at the center of the proposed class's claims will facilitate development of a uniform framework for analyzing detainee claims to a bond hearing. This would render management of these claims more efficient for the courts. It would also benefit many of the putative class members by obviating the severe practical concerns that would likely attend them were they forced to proceed alone. In many of the cases where we have adjudicated these immigration detention claims, the petitioner had been detained well beyond six months, the point at which counsel contends that the putative class members should be entitled to a bond hearing. *See, e.g., Tijani*, 430 F.3d at 1242 (9th Cir. 2005) (ordering a bond hearing after an alien was detained for nearly three years). Without certification, therefore, many of the putative class members likely would not be able to adjudicate their claimed need of a bond hearing after six months of detention—that claim would become moot before the district court could come to a decision. Thus, for many of the puta-

tive class members, class treatment in this case is likely necessary to provide the remedy sought.

To the extent there may be any concern that the differing statutes authorizing detention of the various class members will render class adjudication of class members' claims impractical or undermine effective representation of the class, it may counsel the formation of subclasses. *See* Fed. R. Civ. P. 23(c)(5); *Marisol A.*, 126 F.3d at 378-79 (finding subclasses appropriate where groups of class members each had "separate and discrete legal claims pursuant to particular federal and state constitutional, statutory, and regulatory obligations of the defendants"). Because the possibility of subclasses was not raised below, we leave it to the district court to reach it in the first instance. The parties may submit proposals for formation of subclasses on remand and the district court shall exercise its discretion to determine whether adoption of any proposal would be appropriate. *See U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 407-08, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980) (holding that court of appeals may order district court to consider any proposals for subclasses made on remand). The district court, however, should not lose sight of the overarching issue: The circumstances, if any, that would warrant prolonged detention without hearing.

B. Typicality

The typicality requirement looks to whether "the claims of the class representatives [are] typical of those of the class, and [is] 'satisfied when each class

member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability.'" *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) (quoting *Marisol A.*, 126 F.3d at 376). Like the commonality requirement, the typicality requirement is "permissive" and requires only that the representative's claims are "reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. We conclude that Petitioner's claim for a bond hearing is reasonably co-extensive with the claims of the class. Though Petitioner and some of the other members of the proposed class are detained under different statutes and are at different points in the removal process and hence do not raise identical claims, they all, as already discussed, raise similar constitutionally-based arguments and are alleged victims of the same practice of prolonged detention while in immigration proceedings. *Cf. Armstrong*, 275 F.3d at 869 (finding typicality where class representatives suffered with rest of class "a refusal or failure to afford them accommodations as required by statute, and [were] objects of discriminatory treatment on account of their disabilities" in parole and parole revocation proceedings).

Respondents argue that Petitioner's claims are not typical of the class because of his supervised release and because of his aggravated felon status, currently under appeal. Both are immaterial. The single relevance Petitioner's supervised release has to his claim is to whether it renders Petitioner's claim moot.

Defenses unique to a class representative counsel against class certification only where they "threaten to become the focus of the litigation." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (internal quotation marks and citation omitted). We have determined that Petitioner's supervised release does not moot his claim and, therefore, no mootness defense particular to him will interfere with the ongoing class litigation.

Petitioner's aggravated felon status is similarly of no significance to the typicality analysis. The claims of Petitioner and the class on the whole are that they are entitled to a bond hearing in which dangerousness and risk of flight are evaluated. While Petitioner's criminal history is currently central to the question of whether Petitioner will ultimately be removed and will almost certainly be relevant to any bond hearing determination, the determination of whether Petitioner is *entitled* to a bond hearing will rest largely on interpretation of the statute authorizing his detention. The particular characteristics of the Petitioner or any individual detainee will not impact the resolution of this general statutory question and, therefore, cannot render Petitioner's claim atypical.

C. Adequacy

"Whether the class representatives satisfy the adequacy requirement depends on 'the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit

is collusive.'" *Walters*, 145 F.3d at 1046 (quoting *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994)). Petitioner alleged the qualifications of his counsel and the lack of conflict or collusion in the court below. Respondents do not question these allegations. Instead, they challenge Petitioner's adequacy only by reasserting their commonality and typicality arguments. *See Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982) (noting that commonality and typicality concerns also relate to a representative's adequacy). As we do not find that these arguments have merit, Respondents have provided no reason to conclude that class certification is properly denied for the reason that Petitioner is an inadequate class representative.

D. Rule 23(b)(2)

Respondents challenge certification under Rule 23(b)(2) on grounds parallel to their challenge under Rule 23(a). Respondents assert that as class members are potentially detained pursuant to different statutes, Respondents have not refused to act or acted on grounds generally applicable to the class. In particular, Respondents note that some class members may not ultimately be entitled to a bond hearing because they are properly subject to mandatory detention and that the regulations currently implementing the various discretionary detentions statutes provide for a different burden of proof at bond hearings than that found to be required by us in *Casas-Castrillon* for aliens detained pursuant to Section 1226(a).

Respondents' contentions miss the point of Rule 23(b)(2). "Class certification under Rule 23(b)(2)" requires that "the primary relief sought is declaratory or injunctive." *Zinser*, 253 F.3d at 1195. The rule does not require us to examine the viability or bases of class members' claims for declaratory and injunctive relief, but only to look at whether class members seek uniform relief from a practice applicable to all of them. As we have previously stated, "it is sufficient" to meet the requirements of Rule 23(b)(2) that "class members complain of a pattern or practice that is generally applicable to the class as a whole." *Walters*, 145 F.3d at 1047; *see Alliance to End Repression v. Rochford*, 565 F.2d 975, 979 (7th Cir. 1977) (finding Rule 23(b)(2) met despite "individual qualities of [the] suit" because of "pattern or practice characteristic of defendants' conduct that is generally applicable to the class" (internal quotation marks omitted)). The fact that some class members may have suffered no injury or different injuries from the challenged practice does not prevent the class from meeting the requirements of Rule 23(b)(2). *Walters*, 145 F.3d at 1047; *cf. Gibson v. Local 40, Supercargoes and Checkers*, 543 F.2d 1259, 1264 (9th Cir. 1976) ("A class action may be maintained under [Rule] 23(b)(2), alleging a general course of racial discrimination by an employer or union, though the discrimination may have . . . affect[ed] different members of the class in different ways. . . . ") Furthermore, unlike actions brought under one of the other 23(b) prongs, "questions of manageability and judicial economy are . . . irrelevant to 23(b)(2) class

actions." *Forbush v. J.C. Penney Co., Inc.*, 994 F.2d 1101, 1105 (5th Cir. 1993); *see Elliott v. Weinberger*, 564 F.2d 1219, 1229 (9th Cir. 1977) ("By its terms, Rule 23 makes manageability an issue important only in determining the propriety of certifying an action as a(b)(3), not a(b)(2), class action."), *aff'd in pertinent part and rev'd in part sub nom. Califano v. Yamasaki*, 442 U.S. 682, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979). The proposed members of the class each challenge Respondents' practice of prolonged detention of detainees without providing a bond hearing and seek as relief a bond hearing with the burden placed on the government. The particular statutes controlling class members' detention may impact the viability of their individual claims for relief, but do not alter the fact that relief from a single practice is requested by all class members. Similarly, although the current regulations control what sort of process individual class members receive at this time, all class members' seek the exact same relief as a matter of statutory or, in the alternative, constitutional right. Hence, we conclude that the proposed class meets the requirements of Rule 23(b)(2). *Cf. Walters*, 145 F.3d at 1047 (certifying under Rule 23(b)(2) class of aliens seeking declaratory and injunctive relief on ground that they received constitutionally deficient notice of deportation procedures following charges of document fraud); *Marisol A.*, 126 F.3d at 378 (certifying under Rule 23(b)(2) class of children seeking declaratory and injunctive relief from systemic failures in child welfare

system despite differing harms experienced by class members).

VII. Conclusion

Having found that none of the bars to class relief raised by Respondents prevent certification of the proposed class and that the class meets the requirements of Rule 23, we reverse the district court's denial of class certification and we remand for further proceedings. We leave to the district court's discretion the question of whether formation of subclasses would be appropriate

REVERSED AND REMANDED.

APPENDIX D

UNITED STATES DISTRICT COURT
C.D. CALFORNIA, WESTERN DIVISION

No. CV 07-3239 TJH (RNBx)

ALEJANDRO RODRIGUEZ, ET AL., PETITIONERS

v.

ERIC HOLDER, ET AL., RESPONDENTS

Aug. 6, 2013

ORDER, JUDGMENT AND PERMANENT INJUNCTION

TERRY J. HATTER, JR., Senior District Judge.

The Court has considered Petitioners' motion to clarify the class definition and the cross motions for summary judgment together, with moving and opposing papers.

The Court certified the class in this case after the Ninth Circuit held that the class must be certified. *Rodriguez v. Hayes (Rodriguez I)*, 591 F.3d 1105 (9th Cir. 2010). The class is defined as:

> All non-citizens within the Central District of California who: (1) Are or were detained for longer than six months pursuant to one of the general immigration

> detention statutes pending completion of removal proceedings, including judicial review; (2) Are not and have not been detained pursuant to a national security detention statute; and (3) Have not been afforded a hearing to determine whether their detention is justified.

"General immigration statutes" in the class definition refers to 8 U.S.C. §§ 1225(b), 1226 and 1231(a). *See Rodriguez I*, 591 F.3d at 1113. "Removal proceedings" does not narrowly refer to its use in 8 U.S.C. § 1229a, but to any proceedings to determine whether persons detained pursuant to the general immigration statutes, as defined in *Rodriguez I*, will be removed from the United States.

For organizational purposes, the class is divided into four subclasses, as follows:

1. Class members detained under 8 U.S.C. § 1225(b);
2. Class members detained under 8 U.S.C. § 1226(a);
3. Class members detained under 8 U.S.C. § 1226(c); and
4. Class members detained under 8 U.S.C. § 1231(a).

The Court provided for no exceptions to the definitions of class membership, yet Respondents have unilaterally excluded certain detainees. Consequently,

It is Ordered that there are no exceptions, express or implied, to the class membership definitions.

It is further Ordered that class membership includes, *inter alia*, detainees incarcerated for restatement under 8 U.S.C. § 1231(a)(5), detainees held for proceedings initiated by an administrative removal order under 8 U.S.C. § 1228(b); and detainees held under the general immigration statutes after entering the United States through the Visa Waiver Program.

There are no genuine issues of material fact, and neither party contests that those detained under § 1231 or § 1226(a) have a right to a bond hearing after six months of detention. Most of Respondents's arguments were previously addressed by this Court and affirmed by the Circuit in *Rodriguez v. Robbins (Rodriguez II)*, 715 F.3d 1127 (9th Cir. 2013). However, Respondents raises one new argument. Respondents argue that constitutional concerns are not implicated because the *Rodriguez II* panel did not consider evidence that "a large number of aliens" extend the term of their own detention through their own actions, such as requests for continuances. For this argument, Respondents rely on *Demore v. Kim*, 538 U.S. 510, 526, 123 S. Ct. 1708, 1719, 155 L. Ed. 2d 724, —, 155 L. Ed. 724, 739 (2003), which the Ninth Circuit explicitly construed to only support brief periods of detention. *Rodriguez II*, 715 F.3d at 1135.

The procedural requirements for bond hearings are well settled in the Ninth Circuit. *See Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942 (9th Cir. 2008). In *Rodriguez II*, the Ninth Circuit reaffirmed that the procedural requirements for a *Casas* bond hearing are those articulated in *Singh v. Holder*, 638 F.3d 1196,

1203-10 (9th Cir. 2011). *Rodriguez II*, 715 F.3d at 1135-36. The government must prove by clear and convincing evidence that a detainee is a flight risk or a danger to the community to justify the denial of bond at a *Casas* hearing. *Rodriguez II*, 715 F.3d at 1136. Additionally, due process requires a contemporaneous record of Casas hearings, so that a transcript or audio recording is available upon request. *Rodriguez II*, 715 F.3d at 1136.

Petitioners, now, request four additional procedural safeguards. First, Petitioners request that an Immigration Judge be required to consider whether the detainee will ever be removed. Second, Petitioners request that an Immigration Judge be required to consider conditions short of incarceration. Third, Petitioners request that the bond hearings be automatically provided, rather than placing the burden on the detainee to request the hearing. Finally, Petitioners request that notice of the hearing be provided to each detainee in plain language, reasonably calculated to inform a person unfamiliar with English and the United States legal system of the pendency of the hearing.

The first and second proposed procedural additions—consideration of the likelihood of removal during a bond hearing, and consideration of alternatives to incarceration—fall outside the ambit of *Casas*, *Singh*, and *Rodriguez II*. *Rodriguez II* affirmed that the purpose of a *Casas* bond hearing is to determine a detainee's flight risk and dangerousness. *Rodriguez II*, 715 F.3d at 1135-36. Accordingly, Petitioners' request that Immigration Judges consider the likelihood of detainees' ultimate re-

moval as a factor at bond hearings would drastically expand the scope and purpose of bond hearings. Such a requirement would require legal and political analyses beyond what would otherwise be considered at a bond hearing, and would place an unreasonable burden on overly burdened Immigration Judges. As to the second request, Immigration Judges should already be considering restrictions short of incarceration, including house arrest with electronic monitoring, in determining a detainee's flight risk and dangerousness. *Rodriguez II*, 715 F.3d at 1131.

On the other hand, Petitioners' request that the bond hearings be provided automatically and that the notice to detainees of the bond hearings be provided in plain language are consistent with the due process concerns of *Casas*, *Singh*, and *Rodriguez II*. The bond hearing process would be fraught with peril if the Court were to place the burden on detainees to request a bond hearing when the government is constitutionally obligated to provide those hearings. Accordingly, comprehendible notice must be provided to detainees for that notice to pass constitutional review.

Petitioners are entitled to judgment as a matter of law. Members of all four subclasses—Sections 1231, 1226(a), 1226(c), and 1225(b)—should be afforded bond hearings after six months of detention, consistent with *Rodriguez II*. The procedural requirements of the bond hearings should be consistent with the findings of the Ninth Circuit in *Singh*, and *Rodriguez II*. Additionally, bond hearings should be provided automatically, and plain language no-

tice, in writing, of the bond hearings should be provided to detainees prior to the hearing.

It is further Ordered that Petitioners' motion for summary judgment be, and hereby is, Granted.

It is further Ordered that Respondents' motion for summary judgment be, and hereby is, Denied.

It is further Ordered, Adjudged and Decreed that Judgment be, and hereby is, Entered in favor of Petitioners and against Respondents.

It is further Ordered that Respondents and their agents, employees, assigns, and all those acting in concert with them be, and hereby are, Permanently Enjoined as follows:

1. Respondents shall provide each class member, by the class member's 181st day of detention, with a a bond hearing before an Immigration Judge consistent with the substantive and procedural requirements set forth in this Order and *Casas*, *Singh*, and *Rodriguez II*.

2. The bond hearings shall be recorded or transcribed so that a written record can be made available if an appeal is taken.

3. At least seven days prior to providing any bond hearing conducted pursuant to this Order, Respondents shall provide written notice, in plain language, to the detainee of his or her upcoming bond hearing. For notice to be sufficient, Respondents must take reasonable steps to ensure receipt of the notice by the class member and class counsel.

4. For class members who have already been detained for more than six months as of the date of this order, but who have not yet received a bond hearing pursuant to this Court's preliminary injunction, Respondents shall provide a bond hearing before an Immigration Judge consistent with the requirements of this Order and *Casas*, *Singh*, and *Rodriguez II*, within 30 days of the date of this Order.

5. Within 60 days of the date of this Order, Respondents shall file a status report describing the steps taken to timely identify all current and future class members and to ensure that they receive bond hearings and notice of those hearings. Along with the status report, Respondents shall file under seal (with a copy served on class counsel) a list containing each class member's name and alien number, the date of any scheduled or completed bond hearing, whether the class member is or was represented, the Immigration Judge who conducted or will conduct the hearing, the bond amount set, if any, and whether any appeal has been taken. Respondents shall file and serve an updated status report and class member list every 90 days thereafter until August 1, 2015. The updated reports and lists shall include the information for all class members in detention as of the date of the prior report.

6. If Respondents determine that an individual is not a class member even though that individual (a) is detained in Respondents' custody within the Central District, (b) has been detained by Respondents for six months or longer, (c) is not detained under 8 U.S.C. § 1226a or 8

U.S.C. § 1531-37, and (d) remains detained even though the government does not have present authority to deport that individual, Respondents shall notify class counsel of that individual's circumstances and the reason Respondents believe that individual is not a class member.

7. For class members in detention as of the date of this Order, Respondents shall provide class counsel with notice of class member bond hearings at the same time that they provide notice to class members directly.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Nos. CV-07-03239-TJH(RNBx)
SA CV 11-01287-TJH(RNBx)

ALEJANDRO RODRIGUEZ, ET AL., PETITIONERS

v.

TIMOTHY S. ROBBINS, ET AL., RESPONDENTS

Filed: Sept. 13, 2012

ORDER AND PRELIMINARY INJUNCTION

TERRY J. HATTER, JR., Senior District Judge.

The Court has considered Petitioners' motion for a preliminary injunction, together with the moving and opposing papers.

It is Ordered that the motion be, and hereby is, Granted.

The Court finds that Petitioners have demonstrated a substantial likelihood of success on the merits, that they will suffer irreparable injury in the absence of a preliminary injunction, and that the balance of hardships tip sharply in their favor.

It is further Ordered that Respondents and their agents, employees, assigns, and all those acting in concert with them, are preliminarily enjoined as follows:

1. Within thirty days of the date of this order, Respondents shall identify all members of the Section 1225(b) and Section 1226(c) Subclasses and provide each of them with a bond hearing before an Immigration Judge with power to grant their release. The Immigration Judge shall release each Subclass member on reasonable conditions of supervision, including electronic monitoring if necessary, unless the government shows by clear and convincing evidence that continued detention is justified based on his or her danger to the community or risk of flight.

2. The bond hearings shall be recorded, so that transcriptions will be available in the event of any appeal.

3. Within thirty days of the date of this Order, Respondents shall develop a system to timely identify all future Subclass members and ensure that they receive such bond hearings.

APPENDIX F

1. 8 U.S.C. 1225 provides in pertinent part:

Inspection by immigration officers; expedited removal of inadmissible arriving aliens; referral for hearing

(a) Inspection

(1) Aliens treated as applicants for admission

An Alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this chapter an applicant for admission.

* * * * *

(3) Inspection

All aliens (including alien crewmen) who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States shall be inspected by immigration officers.

* * * * *

(b) Inspection of applicants for admission

(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled

(A) Screening

(i) In general

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

(ii) Claims for asylum

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B).

(iii) Application to certain other aliens

(I) In general

The Attorney General may apply clauses (i) and (ii) of this subparagraph to any or all aliens described in sub-clause (H) as designated by the Attorney General. Such designation shall be in the sole and unreviewable discretion of the Attorney General and may be modified at any time.

(II) Aliens described

An alien described in this clause is an alien who is not described in subparagraph (F), who has not been admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility under this subparagraph.

(B) Asylum interviews

(i) Conduct by asylum officers

An asylum officer shall conduct interviews of aliens referred under subparagraph (A)(ii), either at a port of entry or at such other place designated by the Attorney General.

(ii) Referral of certain aliens

If the officer determines at the time of the interview that an alien has a credible fear of persecution (within the meaning of clause (v)), the alien shall be detained for further consideration of the application for asylum.

(iii) Removal without further review if no credible fear of persecution

(I) In general

Subject to sub-clause (III), if the officer determines that an alien does not have a credible fear of persecution, the officer shall order the alien removed from the United States without further hearing or review.

(II) Record of determination

The officer shall prepare a written record of a determination under subclause (I). Such record shall include a summary of the material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's anal-

ysis of why, in the light of such facts, the alien has not established a credible fear of persecution. A copy of the officer's interview notes shall be attached to the written summary.

(III) Review of determination

The Attorney General shall provide by regulation and upon the alien's request for prompt review by an immigration judge of a determination under subclause (I) that the alien does not have a credible fear of persecution. Such review shall include an opportunity for the alien to be heard and questioned by the immigration judge, either in person or by telephonic or video connection. Review shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the determination under subclause (I).

(IV) Mandatory detention

Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.

* * * * *

(C) Limitation on administrative review

Except as provided in subparagraph (B)(iii)(III), a removal order entered in accordance with subparagraph (A)(i) or (B)(iii)(I) is not subject to administrative appeal, except that the Attorney General shall provide by regulation for prompt review of such an order under subparagraph (A)(i) against an alien who claims under oath, or as permitted under penalty of perjury under section 1746 of title 28, after having been warned of the penalties for falsely making such claim under such conditions, to have been lawfully admitted for permanent residence, to have been admitted as a refugee under section 1157 of this title, or to have been granted asylum under section 1158 of this title.

(D) Limit on collateral attacks

In any action brought against an alien under section 1325(a) of this title or section 1326 of this title, the court shall not have jurisdiction to hear any claim attacking the validity of an order of removal entered under subparagraph (A)(i) or (B)(iii).

* * * * *

(2) Inspection of other aliens

(A) In general

Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission,

if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.

(B) Exception

Subparagraph (A) shall not apply to an alien—

(i) who is a crewman,

(ii) to whom paragraph (1) applies, or

(iii) who is a stowaway.

(C) Treatment of aliens arriving from contiguous territory

In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

(3) Challenge of decision

The decision of the examining immigration officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer and such challenge shall operate to take the alien whose privilege to be admitted is so challenged, before an immigration judge for a proceeding under section 1229a of this title.

2. 8 U.S.C. 1226 provides in pertinent part:

Apprehension and detention of aliens

(a) Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) of this section and pending such decision, the Attorney General—

(1) may continue to detain the arrested alien; and

(2) may release the alien on—

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

* * * * *

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who—

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[1] to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

---

[1] So in original. Probably should be "sentenced".

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

3. 8 U.S.C. 1231(a) provides in pertinent part:

Detention and removal of aliens ordered removed

(a) Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United

States within a period of 90 days (in this section referred to as the "removal period").

(B) Beginning of period

The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

(C) Suspension of period

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General

release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(3) Supervision after 90-day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien—

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

* * * * *

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

* * * * *

4. 8 U.S.C. 1101(a)(13) provides:

Definitions

(a) As used in this chapter—

* * * * *

(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—

(i) has abandoned or relinquished that status,

(ii) has been absent from the United States for a continuous period in excess of 180 days,

(iii) has engaged in illegal activity after having departed the United States,

(iv) has departed from the United States while under legal process seeking removal of the alien from

the United States, including removal proceedings under this chapter and extradition proceedings,

(v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or

(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

5. 8 C.F.R. 236.1 provides in pertinent part:

Apprehension, custody, and detention

* * * * *

(c) *Custody issues and release procedures*—

* * * * *

(8) Any officer authorized to issue a warrant of arrest may, in the officer's discretion, release an alien no described in section 236(c)(1) of the Act, under the conditions at section 236(a)(2) and (3) of the Act; provided that the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding. Such an officer may also, in the exercise of discretion, release an alien in deportation proceedings pursuant to the

authority in section 242 of the Act (as designated prior to April 1, 1997), except as otherwise provided by law.

* * * * *

(d) *Appeals from custody decisions*—(1) *Application to immigration judge.* After an initial custody determination by the district director, including the setting of a bond, the respondent may, at any time before an order under 8 CFR part 240 becomes final, request amelioration of the conditions under which he or she may be released. Prior to such final order, and except as otherwise provided in this chapter, the immigration judge is authorized to exercise the authority in section 236 of the Act (or section 242(a)(1) of the Act as designated prior to April 1, 1997 in the case of an alien in deportation proceedings) to detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released, as provided in § 3.19 of this chapter. If the alien has been released from custody, an application for amelioration of the terms of release must be filed within 7 days of release.

(2) *Application to the district director.* After expiration of the 7-day period in paragraph (d)(1) of this section, the respondent may request review by the district director of the conditions of his or her release.

(3) *Appeal to the Board of Immigration Appeals.* An appeal relating to bond and custody determinations may be filed to the Board of Immigration Appeals in the following circumstances:

(i) In accordance with § 3.38 of this chapter, the alien or the Service may appeal the decision of an immigration judge pursuant to paragraph (d)(1) of this section.

(ii) The alien, within 10 days, may appeal from the district director's decision under paragraph (d)(2)(i) of this section.

(4) *Effect of filing an appeal.* The filing of an appeal from a determination of an immigration judge or district director under this paragraph shall not operate to delay compliance with the order (except as provided in § 3.19(i)), nor stay the administrative proceedings or removal.

* * * * *

6. 8 C.F.R. 1003.19 provides in pertinent part:

Custody/bond.

(a) Custody and bond determinations made by the service pursuant to 8 CFR part 1236 may be reviewed by an Immigration Judge pursuant to 8 CFR part 1236.

* * * * *

(e) After an initial bond redetermination, an alien's request for a subsequent bond redetermination shall be made in writing and shall be considered only upon a showing that the alien's circumstances have changed materially since the prior bond redetermination.

* * * * *

(h)(2)(i) Upon expiration of the Transition Period Custody Rules set forth in section 303(b)(3) of Div. C. of Pub. L. 104-208, an immigration judge may not redetermine conditions of custody imposed by the Service with respect to the following classes of aliens:

(A) Aliens in exclusion proceedings;

(B) Arriving aliens in removal proceedings, including aliens paroled after arrival pursuant to section 212(d)(5) of the Act;

(C) Aliens described in section 237(a)(4) of the Act;

(D) Aliens in removal proceedings subject to section 236(c)(1) of the Act (as in effect after expiration of the Transition Period Custody Rules); and

(E) Aliens in deportation proceedings subject to section 242(a)(2) of the Act (as in effect prior to April 1, 1997, and as amended by section 440(c) of Pub. L. 104-132).

(ii) Nothing in this paragraph shall be construed as prohibiting an alien from seeking a redetermination of custody conditions by the Service in accordance with part 1235 or 1236 of this chapter. In addition, with respect to paragraphs (h)(2)(i)(C), (D), and (E) of this section, nothing in this paragraph shall be construed as prohibiting an alien from seeking a determination by an immigration judge that the alien is not properly included within any of those paragraphs.

* * * * *

7. 8 C.F.R. 1003.29 provides:

Continuances.

The Immigration Judge may grant a motion for continuance for good cause shown.

Supreme Court, U.S.
FILED
MAY 10 2016
OFFICE OF THE CLERK

No. 15-1204

IN THE

Supreme Court of the United States

DAVID JENNINGS, *et al.*,
Petitioners,

v.

ALEJANDRO RODRIGUEZ, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

This case concerns noncitizens whom the Government has incarcerated for more than six months without a hearing to determine if their detention remains justified. Our legal system rarely, if ever, permits incarceration for the lengths at issue here with no opportunity to be heard before a neutral decisionmaker. The questions presented are:

1. Whether, to avoid the serious constitutional problems created by prolonged detention, 8 U.S.C. 1225(b) should be construed to provide an individual detained for more than six months with a hearing where an Immigration Judge can determine whether their detention remains justified.

2. Whether, to avoid the serious constitutional problems created by prolonged detention, 8 U.S.C. 1226(c) should be construed to provide an individual detained for more than six months with a hearing where an Immigration Judge can determine whether their detention remains justified.

3. Whether, before subjecting an individual to detention exceeding six months, the government must provide the same hearing protections that this Court has required in other civil detention contexts.

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OTHER AUTHORITY

Joseph Langlois, Dep't of Homeland Sec., *Border Security Oversight, Part III: Examining Asylum Requests* (July 17, 2013), https://www.dhs.gov/news/2013/07/17/written-testimony-uscis-house-oversight-and-government-reform-subcommittee-national 18

INTRODUCTION

The Government seeks review of three entirely distinct questions arising from its confinement of three different groups of individuals detained under different statutory and regulatory regimes. None of the questions warrants review.

There is no circuit split on the first question, nor is one likely to develop. Because Section 1225(b) authorizes the detention of lawful permanent residents as well as people apprehended after they have already entered the United States—i.e., individuals who indisputably have due process rights with respect to their detention—the proper construction of Section 1225(b) is dictated by *Clark v. Martinez*, 543 U.S. 371 (2005), and gives rise to no conflict with *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 213 (1953).

As to the second question, all five circuits to address it agree that Section 1226(c) must be read to include a limit on the length of detention it authorizes; Mr. Rodriguez would have won in all of them. No circuit has accepted the Government's view that Section 1226(c) mandates detention without a hearing for the duration of an individual's removal case regardless of length. The circuits differ only on *when* and *how* to ensure that detentions remain reasonable, and this Court would benefit from allowing the circuits' positions to continue to percolate.

There is also no split on the third question, regarding the protections applicable in prolonged detention hearings. The Ninth Circuit's decision is consistent both with other circuits and with principles that this Court has endorsed in other civil

contexts where, as here, the "individual interests at stake . . . are both 'particularly important' and 'more substantial than mere loss of money.'" *Santosky v. Kramer*, 455 U.S. 745, 756 (1982).

The Government's contention that certiorari is warranted to preserve its ability to control the borders and reduce the risk of terrorism is hyperbolic and unsupported by anything in the decision below or the voluminous record compiled in the district court. The injunction has operated in largely its present form since November 2012 with no evidence of adverse effects on immigration enforcement. The injunction does not mandate anyone's release. It merely requires hearings before Immigration Judges. Those judges answer to the Attorney General, who has ultimate authority to reverse any release decisions.

Nor does this case concern "terrorist aliens," as they are expressly excluded from the Class definition. The Government has ample authority to detain individuals without hearings under statutes that specifically authorize prolonged detention in national security cases. The Government has never identified even a single Class member who presented a national security threat.

Finally, the Government's hypothetical assertions that the prospect of hearings once detention exceeds six months will create an incentive for individuals to cross the border illegally and delay their cases while detained also lack any record support. Even before the preliminary and permanent injunctions in this case, the Government already provided bond hearings to thousands of individuals apprehended in the border region at the outset of their detention, as soon as they pass an initial interview to determine if they have a credible fear of persecution. Thus, the Ninth

Circuit's rule provides little if any additional incentive. Likewise, there is no record evidence that, since the injunction, detainees have attempted to unreasonably delay their cases (and prolong their detention) in hopes of obtaining a hearing. Even if there were, that problem would be addressed at the detention hearing itself, where an Immigration Judge retains authority to use such delay as a basis for denying release.

COUNTER-STATEMENT OF THE CASE

I. LEGAL FRAMEWORK

The Government's account of the legal framework applicable to each Subclass overstates the effects of the Ninth Circuit's decision. Most important, the decision applies only to individuals subject to prolonged detention.

A. Prolonged Detention Without Hearings Under Section 1225(b)

Only two provisions of Section 1225(b) are at issue here: Section 1225(b)(1)(B)(ii) and Section 1225(b)(2)(A). App. 108a. These provisions apply only to the small percentage of individuals arriving at our borders whom the Government will refer for full removal proceedings before an Immigration Judge. The overwhelming majority of such individuals are asylum seekers who have previously established a credible fear of persecution and are detained under Section 1225(b)(1)(B)(ii). They are part of the Section 1225(b) Subclass because the Government chooses to detain them while they pursue bona fide asylum claims. *See* 8 U.S.C. 1225(b)(1)(B)(ii) (authorizing detention of individuals who establish a credible fear of persecution and are referred for full removal proceedings). In contrast, most individuals who arrive

at the border without valid documents are denied admission, detained, and removed without ever appearing before an Immigration Judge. 8 U.S.C. 1225(b)(1)(A)(i); 8 U.S.C. 1225(b)(1)(B)(iii)(IV) (mandating detention after initial finding of no credible fear, including during any appeal thereof).

Section 1225(b)(2)(A) authorizes the detention of "other" noncitizens not clearly entitled to admission, including returning lawful residents (LPRs) stopped at the border after brief travel abroad if, *inter alia*, they have certain prior convictions or if DHS officials believe they engaged in illegal activity while abroad. *See, e.g.*, *Landon v. Plasencia*, 459 U.S. 21 (1982); 8 U.S.C. 1101(a)(13)(C) (defining circumstances under which returning LPRs will be deemed to be "seeking . . . admission"). Because the regulations classify such returning LPRs as "arriving aliens," they are read to prohibit Immigration Judges from reviewing the custody status of returning LPRs. 8 C.F.R. 1003.19(h)(2)(i), 1236.1. Prior to the Ninth Circuit's decision, these individuals were subject to prolonged detention without hearings.

While the Government claims that detention of Section 1225(b) Subclass members is mandatory, Pet. 12-13, it releases many such individuals on parole. In addition, it already provides bond hearings to some detainees subject to Section 1225(b)—those who entered the United States without inspection, were placed into "expedited removal" proceedings, and then passed a credible fear interview. *Matter of X-K-*, 23 I. & N. Dec. 731, 734-35 (B.I.A. 2005).

B. Mandatory Detention Under Section 1226(c)

The Government subjects a broad range of individuals to mandatory detention under Section

1226(c) pending completion of their removal cases, including many individuals with substantial defenses to removal. Individuals subject to mandatory detention under Section 1226(c) may challenge the basis for that classification at a hearing before an Immigration Judge. *See* Pet. 4-5 (citing 8 C.F.R. 1003.19(h)(2)(ii)). However, to escape mandatory detention and thereby obtain a bond hearing, a detainee must show that DHS is "substantially unlikely to prevail" on its claim that the conviction at issue triggers mandatory detention. *Matter of Joseph*, 22 I. & N. Dec. 799, 807 (B.I.A. 1999). A "strong argument" against DHS's position does not suffice. *Compare Demore v. Kim*, 538 U.S. 510, 578 (2003) (Breyer, J., dissenting), *with Matter of Flores-Lopez*, No. A43 738 693, 2008 WL 762690, at *1-2 (B.I.A. Mar. 5, 2008). Thus, many individuals who will prevail in their removal cases are nonetheless subject to mandatory detention during the process.

The Government also interprets the mandatory detention requirement to apply even where an individual is eligible for relief from removal. For example, in the Government's view, LPRs with a conviction for a controlled substance offense like simple possession—which is not an aggravated felony—are subject to mandatory detention, even though they are not necessarily barred from seeking cancellation of removal because of that conviction. *See* 8 U.S.C. 1229b(a). Under the Government's view, such individuals must remain detained while they litigate their relief applications, even if they are likely to prevail.[1]

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[1] The Government's brief does not make clear whether it recognizes an exception to mandatory detention for individuals detained either while judicial review of their removal orders is pending or after their cases are remanded—an exception that

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

The decision below rests on a substantial evidentiary record that is largely ignored in the Government's petition. The record includes detailed information about approximately 1,000 Class members (the "studied Class members") drawn from their immigration files and extensive database information about them. The record also includes depositions of government officials, declarations from Class members, and documents containing the Government's policies and trainings.

The certified Class was defined by the district court to include all noncitizens in the Central District of California detained by DHS for more than six months while their cases remain pending without a hearing to determine whether their detention remains justified. The Class definition, however, expressly excludes any noncitizens detained for national security reasons pursuant to separate statutes authorizing such detentions. In addition, the district court certified three Subclasses corresponding to the three provisions of the INA at issue in this case: 8

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would have mattered for lead Respondent Alejandro Rodriguez and many other Class members. *See Casas-Castrillon v. DHS*, 535 F.3d 942, 951 (9th Cir. 2008) (holding that such individuals are detained under Section 1226(a)); *Bejjani v. INS*, 271 F.3d 670, 689 (6th Cir. 2001) (same), *abrogated on other grounds by Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006); *Leslie v. Attorney Gen.*, 678 F.3d 265 (3d Cir. 2012) (same); *Wang v. Ashcroft*, 320 F.3d 130 (2d Cir. 2003) (same). *But see Akinwale v. Ashcroft*, 287 F.3d 1050 (11th Cir. 2002) (per curiam) (assuming, without analysis, that a stay serves to "suspend" the removal period, and that detention pending a judicial stay is therefore governed by 8 U.S.C. 1231(a)(2)).

U.S.C. 1225(b), 8 U.S.C. 1226(a), and 8 U.S.C. 1226(c).[2]

A. Record Facts About The Class

Prior to the preliminary and permanent injunctions in this case, Class members suffered lengthy detentions without hearings. Most Class members were incarcerated for far more than six months. The average detention for the studied Class members lasted approximately 404 days, with a median of nearly one year. Roughly 21% were incarcerated for more than 18 months, and roughly 9% for more than two years. Expert Reports of Susan B. Long, No. 13-56706, Dkt. 11-4 (hereinafter "Long Rep.") at ER 683, tbls.2, 3.[3]

Class members spent longer in detention than other noncitizens because they had substantial defenses to removal, which they often won. Long Rep. at ER 686 at tbl.7, 692 at tbl.17; *cf. id.* at ER 721-722.

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[2] The district court also certified a Subclass of individuals with administratively final orders of removal who are detained under 8 U.S.C. 1231(a). However, the Ninth Circuit held the Subclass "does not exist" because individuals detained pending completion of judicial review of a final order are held under Section 1226(a), and therefore part of a different Subclass. App. 51a, 47a.

[3] The statistics in this section are drawn from information about the studied Class members, which includes individuals in the three Subclasses. Facts specific to the Section 1225(b) and Section 1226(c) Subclasses are presented *infra*. Because the Government does not maintain database information from which Section 1226(a) Subclass members could be readily identified, the record does not contain database information specific to the Section 1226(a) Subclass. The parties disputed how to calculate some of these statistics, but the disputes are not material. For example, the Government asserted that the average detention length was best calculated as 334 rather than 404 days.

Of the studied Class members, 35% won their cases, compared with only 7% of a comparable set of all detainees. *Id.* at ER 721, tbl.35.

The vast majority of Class members—excluding asylum seekers who typically have had no prior contact with this country—had lived in the United States for years, often for decades, developing extensive ties. Roughly half arrived as children or young adults. *See* Declaration of Michael Tan, No. 13-56706, Dkt. 122 (hereinafter "Tan Dec.") at SER 172b-172d ¶¶ 31, 36 (46% age 21 or under at entry; 30% age 18 or under). Over 60% had U.S. citizen children. *Id.* at SER 169-171 ¶¶ 15-20. Their detention resulted in the loss of crucial support for their relatives, including sick parents, small children, and older children pursuing higher education. Declaration of Ahilan Arulanantham, No. 13-56709, Dkt. 142-2 (hereinafter "Arulanantham Dec.") at SER 83-84 ¶¶ 47-52 (Class member unable to care for sick mother and then denied request to attend her funeral), SER 80 ¶ 44 (Class member unable to support young children), SER 86 ¶ 71 (daughter dropped out of college because of father's detention).

B. Record Facts About Lead Respondent Alejandro Rodriguez

Mr. Rodriguez, a long time LPR who was brought to the United States as an infant, was detained more than three years before the Government released him during this litigation. He ultimately won his case.

Before his removal proceedings began, Mr. Rodriguez worked as a dental assistant. In 2003, he was convicted of possession of a controlled substance and sentenced to five years of probation. He also had a prior conviction for "joyriding."

ICE commenced removal proceedings against Mr. Rodriguez in April 2004, and at that time subjected him to mandatory detention under Section 1226(c). Shortly thereafter, an Immigration Judge determined that his "joyriding" conviction was an "aggravated felony," and therefore ordered him removed. After the Board of Immigration Appeals ("BIA") rejected his appeal, he filed a petition for review to the Ninth Circuit, which stayed his removal order. This process took approximately nine months.

The Ninth Circuit took approximately four years to decide Mr. Rodriguez's petition for review. Between July 2005 and March 2007, ICE conducted five "custody reviews" in his case—paper reviews of his file by DHS detention officers. The first four determined that he should remain detained because, if he lost his case in the Ninth Circuit, his removal to Mexico would be foreseeable.

However, in July 2007, about a month after Mr. Rodriguez had moved for Class certification in this litigation, ICE conducted a fifth custody review and ordered him released.[4] Ultimately, ICE incarcerated Mr. Rodriguez for 1,189 days before it released him.

About five months later, the Ninth Circuit granted the Government's unopposed motion to vacate and remand his case because his "joyriding" conviction was *not* an aggravated felony. On remand, the Immigration Judge exercised his discretion to grant Mr. Rodriguez cancellation of removal, thus allowing him to retain his lawful permanent resident status.

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[4] Shortly afterward, the Government argued that Mr. Rodriguez's release mooted the detention challenge and rendered him an unfit Class representative. App. 105a. The Ninth Circuit rejected that argument. *Id.* at 116a-118a.

ICE chose not to appeal, thus ending the proceedings 2,650 days after his initial detention.

C. Record Facts About The Section 1225(b) Subclass

Most members of the Section 1225(b) Subclass are apprehended at a port of entry and initially detained as "alien[s] seeking admission." 8 U.S.C. 1225(b)(2)(A). Regulations classify those stopped at the border, including LPRs returning from travel abroad, as "arriving aliens," 8 C.F.R. 1.2, and purport to deprive Immigration Judges of jurisdiction to review the custody status of all "[a]rriving aliens." *See* 8 C.F.R. 1003.19(h)(2)(i)(B).

While most members of the Section 1225(b) Subclass are asylum seekers without prior ties to this country, this Subclass also includes LPRs. The Government routinely detains lawful permanent residents upon their return from travel abroad as "arriving" noncitizens. *See, e.g.*, *Chen v. Aitken*, 917 F. Supp. 2d 1013, 1016, 1018-19 (N.D. Cal. 2013). The record contains evidence of one such Class member. Supp. Brief, No. 13-56706, Dkt. 122, at SER 5e (citing Declaration of Ahilan Arulanantham ¶ 4).

Section 1225(b) Subclass members were detained without hearings for an average of 346 days. Long Rep. at ER 703, tbl.27. 97% applied for asylum, and 64% won their cases. *Id.* at ER 703, tbl.28. The overwhelming majority had no criminal history. Deposition of Wesley Lee, No. 13-56706, Dkt. 122, (hereinafter "Lee Dep.") at SER 151:20-24.

D. Record Facts About The Section 1226(c) Subclass

Section 1226(c) Subclass members were subject to somewhat longer detention than Class members as a

whole, with an average of 427 days. Long Rep. at ER 701, tbl.24. 70% filed for relief that would allow them to avoid entry of a removal order, and 39% of those won it. *Id.* at ER 701, tbl.23. Additionally, approximately 4% won their cases by termination. *Id.* at ER 702, tbl.25-26.

While Section 1226(c) Subclass members by definition have some criminal history, many have convictions for relatively minor offenses and spend far more time in immigration custody than they served for the offenses that triggered mandatory detention. *See* Declaration of Cody Jacobs, No. 13-56706, Dkt. 122 (hereinafter "Jacobs Dec.") at SER 128-129 ¶ 8 (documenting three Class members with controlled substance convictions—for which they were sentenced to 90 days or less—detained 600 days, 646 days and 764 days before winning their immigration cases); Arulanantham Dec. at SER 76-77 ¶¶ 28-31 (long-time LPR with a possession of controlled substance conviction—for which he received diversion sentence—detained 305 days before winning his case). For all Class members with some criminal history, more than half did not have convictions for crimes serious enough to warrant a sentence over six months. *See* Jacobs Dec. at SER 127-28 ¶ 7.

E. Hearings Under The Preliminary And Permanent Injunctions

The outcomes of hearings conducted under the preliminary and permanent injunctions demonstrate that the vast majority of Class members do not present a risk of danger or flight requiring their detention. In approximately 70% of hearings conducted under the injunctions, an Immigration Judge concluded that the Class member's detention was not warranted, and ordered the Class member released

on bond or other conditions. Exhibit B to Patler Declaration, No. 13-56706, Dkt. 24-4 (herein-after "Patler Dec., Ex. B") fig.1. Of those ordered released on bond, 70% posted the bond. *Id.* fig.2; *see also* App. 62a n.2 (observing that approximately two-thirds of Class members given hearings under the preliminary injunction were released). In total, from October 2012 to April 2014, at least 700 Class members were released as a result of the injunctions in this case in the Central District of California, preventing their unnecessary detention for months or years, at great savings to the Government. Patler Dec., Ex. B, fig.2; Long Rep. at ER 693-694, tbl.18.

REASONS FOR DENYING THE PETITION

I. THE SECTION 1225(b) RULING DOES NOT WARRANT CERTIORARI.

A. The Ninth Circuit's Section 1225(b) Ruling Correctly Applies This Court's Precedent And Creates No Conflict With Any Other Circuit.

1. The Ninth Circuit is the only circuit to rule on the question of whether individuals detained under Section 1225(b) for prolonged periods are entitled to hearings to determine if their detention remains justified. Absent any circuit conflict, further percolation in the lower courts is appropriate to determine whether this Court's review is warranted. *See* Sup. Ct. R. 10(a).[5]

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[5] The Ninth Circuit first construed Section 1225(b) not to authorize prolonged detention in *Nadarajah v. Gonzales*, 443 F.3d 1069, 1078-79 (9th Cir. 2006). The Third Circuit noted but declined to address a similar question in *Tineo v. Ashcroft*, 350 F.3d 382, 399 (3d Cir. 2003). District courts have disagreed on the question, although more have favored Respondents' view.

2. The Government asserts that the Ninth Circuit's decision conflicts with *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), which it reads to hold that noncitizens arriving at the border have no due process rights with respect to their admission or detention. Pet. 12-14. But the Ninth Circuit affirmed that reading of *Mezei*. App. 84a-85a. It ruled only on statutory grounds, based on a straightforward application of *Clark v. Martinez*, 543 U.S. 371 (2005). *See* App. 86a-89a (citing *Clark*, 543 U.S. at 380).

In *Clark*, this Court held that the construction of Section 1231(a)(6) that it applied in *Zadvydas v. Davis*, 533 U.S. 678 (2001)—to avoid the constitutional concerns that would have been presented by the indefinite detention of *admitted* noncitizens—also governed the cases of *inadmissible* noncitizens. 543 U.S. at 377-78. "It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern." *Id.* at 380.

Accordingly, because individuals who have already entered the country and returning LPRs are subject to detention under the relevant provisions of Section 1225(b), the Ninth Circuit correctly found that the

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See, e.g., Maldonado v. Macias, — F. Supp. 3d —, 2015 WL 8958848, at *15-17 (W.D. Tex. Dec. 15, 2015) (ordering bond hearing for arriving asylum seeker detained 26 months under Section 1225(b)); *Chen*, 917 F. Supp. 2d at 1016, 1018-19 (same, for returning LPR detained nearly eight months); *but see Cardona v. Nalls-Castillo*, — F. Supp. 3d —, 2016 WL 1553430 (S.D.N.Y. Apr. 14, 2016) (returning LPR detained 14 months not entitled to bond hearing).

statute's construction is governed by *Clark* rather than *Mezei*, and therefore must be construed to avoid the serious constitutional problems arising from the prolonged detention of LPRs without hearings.[6]

Given that the Government already provides bond hearings to individuals detained under Section 1225(b)(1)(B)(ii), *see supra* at 4 (citing *X-K-*), and that neither that provision nor Section 1225(b)(2)(A) expressly authorizes detention after an individual is placed in removal proceedings, let alone for months or years while those proceedings continue, both easily can be read to permit hearings for individuals subject to prolonged detention.

Contrary to the Government's claim, Pet. 16-17, Congress has no authority to strip returning LPRs of due process protections merely because of their criminal history or alleged unlawful conduct while abroad. *Plasencia*, 459 U.S. at 32-36, accorded due process protections to a returning LPR even as it acknowledged that she could, as a statutory matter, be subjected to exclusion proceedings. *Id.* at 32, 34. *Plasencia* held that returning LPRs who are seeking admission retain their due process rights, unless—like the petitioner in *Mezei*—they have forfeited their lawful permanent status by a lengthy absence from the country. *See* App. 89a. *Mezei* itself recognized that Congress could not strip returning LPRs of their due process rights merely by changing the relevant statutory definitions. *See* 345 U.S. at 213 ("To be sure, a lawful resident alien may not captiously be deprived of his constitutional rights to procedural due

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[6] Those problems are similar to the problems created by the prolonged mandatory detention of LPRs under Section 1226(c). *See infra* Sec. II.C.

process."); *accord Kwong Hai Chew v. Colding*, 344 U.S. 590, 600 (1953).

The Government also argues that the Ninth Circuit's ruling conflicts with *Mezei* because, by allowing for the possibility that arriving noncitizens will be released into the country, it "deprived the Executive of plenary control to protect the Nation's borders." Pet. 28; *see also id.* at 10, 12-14. But the mere fact that the ruling results in some arriving noncitizens being released from detention cannot create conflict with *Mezei*, because *Clark* also authorized the release of arriving noncitizens. The Ninth Circuit's application of *Clark* does not grant Immigration Judges (whose decisions can be reversed by the Attorney General, *see* 8 C.F.R. 1003.1(h)), any authority to *admit* individuals into the United States, it only permits Immigration Judges to review their continued detention. As *Zadvydas* held, an individual released from detention does not gain the right to reside in the United States, but merely the right to be free of a restraint on their liberty. 533 U.S. at 695. Thus, the Ninth Circuit's decision involves no shift in control of the nation's borders from the "political branches" to the judiciary.

Moreover, although the Ninth Circuit disagreed with this assertion, the district court's ruling is also consistent with *Mezei* because "both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious," *Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting). In addition, by definition, Class members have not been classified by the Attorney General as national security threats (as Mr. Mezei was). Nor have they been "denied entry"; the majority will win asylum. *Compare Mezei*, 345 U.S. at 212 (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)).

The record evidence shows that the Government's current system for releasing them—the parole process—gives rise to prolonged and arbitrary incarceration. *See, e.g.*, Arulanantham Dec. at SER 93 ¶ 97 (Class member denied release based on documents that referred to the wrong detainee; detained for 319 days without a hearing, and released only after winning asylum claim); *see also Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006) (arriving asylum seeker detained four and a half years while case was pending despite repeatedly winning asylum before Immigration Judge). The record establishes that the parole system affords "no way" to correct egregious errors such as these, because there is no record of decision, no hearing before a judge, and no right to appeal. Lee Dep. at SER 164:5-12. *Mezei* does not authorize detention under such circumstances.

3. Finally, if the Court accepts the Government's view that application of the doctrine of constitutional avoidance to Section 1225(b) turns on the existence of lawful permanent residents in this Subclass, *see* Pet. 16, which Respondents contest, this case would present a poor vehicle for resolving the issue because it would require resolution of a significant factual dispute. *Cf.* Sup. Ct. R. 10. Contrary to the Ninth Circuit's conclusion, *see* App. 43a, the record *does* identify an LPR detained under Section 1225(b). The record would contain more information about such individuals had the Government ever contested their existence in the district court. It did not, despite a declaration in the record documenting an LPR in this Subclass. *See* Supp. Brief, No. 13-56706, Dkt. 122, at SER 5e (citing Declaration of Ahilan Arulanantham ¶ 4).

B. The Ninth Circuit's Section 1225(b) Ruling Does Not Have Practical Consequences That Warrant Certiorari.

1. The Government's speculation about the practical consequences of the Ninth Circuit's Section 1225(b) ruling also do not justify this Court's intervention. The Government provides no evidence, statistical or otherwise, to support its claim that requiring hearings for arriving noncitizens who have been detained more than six months will have dire consequences; nor did it provide any in the district court.

Hearings under the Ninth Circuit's injunctions have been taking place for three and a half years, including for ten months prior to the summary judgment ruling. Yet the Government submits no evidence to support its speculation that arriving noncitizens released after *Rodriguez* hearings failed to appear for their removal proceedings at a rate higher than the general immigration detainee population; that Immigration Judges have ordered the release of individuals who failed to establish their identity; that arriving noncitizens have increasingly engaged in dilatory tactics in their removal proceedings; that the injunction has encouraged more individuals to attempt unlawful entry into the country to obtain the benefits of the Ninth Circuit's ruling; or even that illegal entries have increased within the Ninth Circuit.

The record evidence stands in contrast to the Government's parade of horribles. Under the injunction, bona fide asylum seekers—who make up a clear majority of the Section 1225(b) Subclass, *see* Long Rep. at ER 703, tbl.28—can now obtain release after being subject to prolonged incarceration because the Government refuses to release them on parole,

often for blatantly erroneous reasons. *See generally* Arulanantham Dec. at SER 88-94 ¶¶ 78-101.

2. The Government errs in asserting that the Ninth Circuit's construction of Section 1225(b), coupled with its ruling on the burden of proof, requires the release of individuals whose identities cannot be established. *See* Pet. 19, 31. The Subclass includes only those arriving noncitizens subject to prolonged detention under 8 U.S.C. 1225(b)(1)(B)(ii) and 8 U.S.C. 1225(b)(2)(A). *See* App. 108a. The only asylum seekers detained under those statutes are individuals who have passed a credible fear screening and been referred for removal proceedings.

The government conducts biographic and biometric checks during the credible fear interview to establish identity. *See* Department of Homeland Security, written testimony of Joseph Langlois for House Committee on Oversight and Government Reform, Subcommittee on National Security hearing titled *Border Security Oversight, Part III: Examining Asylum Requests* (July 17, 2013), https://www.dhs.gov/news/2013/07/17/written-testimony-uscis-house-oversight-and-government-reform-subcommittee-national. Only those detainees who pass a credible fear interview can remain in the United States to pursue asylum through removal proceedings before an Immigration Judge, where they will again be required to establish their identity. *Matter of O-D-*, 21 I. & N. Dec. 1079, 1082 (B.I.A. 1998) (noting that the applicant's "identity" is "perhaps the most critical of elements" of an asylum claim); *see also* 8 U.S.C. 1158(d)(5)(A)(i) (requiring identity check). DHS has extensive access to domestic and international law enforcement databases, as well as technologies like electronic fingerprinting and facial recognition, to allow it to test individuals' claims over the course of

six months before any hearing where the Government must justify their detention.

3. The Government also errs in claiming that the Section 1225(b) ruling "creates incentives for aliens to attempt an illegal entry and, if caught, to delay proceedings long enough to obtain . . . a bond hearing," Pet. 33. The Government is *already* providing bond hearings to individuals who are apprehended after unlawfully crossing the border if they pass a credible fear interview, long before they are detained for six months. *X-K-*, 23 I. & N. Dec. at 734-35. To the extent that the possibility of release through a hearing provided after six months of incarceration creates significant incentives for illegal entry and delays, a claim for which there is no record evidence, those incentives would already exist because of the Government's initial provision of bond hearings to those who enter the United States illegally. Hearings under the Ninth Circuit's decision—provided *six months* after detention, and for the first time only to those arriving at ports of entry—could hardly add to those incentives in any material way.

4. The Government's insistence that the Section 1225(b) ruling creates serious consequences warranting this Court's review is also undermined by the procedural history of this case. The Ninth Circuit affirmed the district court's preliminary injunction granting hearings to Section 1226(b) Subclass members where DHS bears the burden of proof by clear and convincing evidence in April 2013, but the Government chose not to petition for rehearing or seek *certiorari* at that time.

II. THE SECTION 1226(c) RULING DOES NOT WARRANT CERTIORARI.

The Ninth Circuit's ruling as to Section 1226(c) also does not warrant this Court's review. Every circuit to address the issue has rejected the Government's position that it has unlimited authority to subject noncitizens to mandatory detention under 8 U.S.C. 1226(c) so long as their removal case remains pending. The circuits have differed only on *when* and *how* individuals subject to prolonged detention can access procedures permitting their release, and their views on those questions continue to percolate. Nor do the Ninth and Second Circuits' decisions—which simply require the Government to justify incarcerating someone for more than six months—present the type of extraordinary practical problems that warrant this Court's review. Those courts correctly found that the mandatory detention of noncitizens under Section 1226(c) is limited to six months, after which the Government must justify the need for continued detention at a hearing.

A. Review Of The Ninth Circuit's Section 1226(c) Ruling Is Premature While The Circuits Continue To Refine The Proper Approach To Implementing The "Reasonableness" Limitation In Section 1226(c).

1. The circuits have uniformly agreed that detention under Section 1226(c) must be limited to a "reasonable" period. *See Reid v. Donelan*, — F.3d —, 2016 WL 1458915, at *4 (1st Cir. Apr. 13, 2016) ("every federal court of appeals to examine § 1226(c) has recognized that the Due Process Clause imposes some form of 'reasonableness' limitation upon the duration of detention that can be considered justifiable under that statute"); App. 75a-80a; *Lora v.*

Shanahan, 804 F.3d 601, 606 (2d Cir. 2015), *petition for cert. filed*, No. 15-1205 (Mar. 28, 2016), No. 15-1307 (Apr. 25, 2016); *Diop v. ICE*, 656 F.3d 221, 232-33 (3d Cir. 2011); *Ly v. Hansen*, 351 F.3d 263, 270 (6th Cir. 2003).

2. While the circuits differ about when and how to determine what constitutes a "reasonable" period under Section 1226(c), their positions continue to evolve. Two circuits—the Ninth and the Second—have construed Section 1226(c) to be limited to six months, after which time an Immigration Judge must conduct an inquiry to determine whether detention remains justified. *See* App. 32a-38a; *Lora*, 804 F.3d at 606. By contrast, three circuits—the First, Third, and Sixth Circuits—have declined to set any particular time at which a "reasonableness" determination must be made, and have either presumed or explicitly decided that a noncitizen must file a habeas petition in federal court to obtain such a determination, but beyond that their approaches have diverged. The Sixth Circuit has held that district courts sitting in habeas should order the release of individuals whose detention exceeds a reasonable time. *Ly*, 351 F.3d at 270. In contrast, the First and Third Circuits have held that once mandatory detention becomes unreasonable (as determined, presumably, by a district court sitting in habeas), a hearing before an Immigration Judge is required to assess danger and flight risk. *See Reid*, 2016 WL 1458915, at *9; *Diop*, 656 F.3d at 233.

After district courts in the Third Circuit struggled to apply consistent and administrable rules in making reasonableness determinations, the Third Circuit moved towards a time-based approach. In *Chavez-Alvarez v. Warden York County Prison*, 783 F.3d 469 (3d Cir. 2015), that court analyzed detention

length "for the sake of providing clear guidance to the Attorney General," and held that where there are no "extraordinary delays" and parties "act[] in good faith," "beginning sometime after the six-month timeframe considered by *Demore*, and certainly by the time [the noncitizen] had been detained for one year, the burdens to [his] liberties outweighed any justification for using presumptions to detain him without bond to further the goals of the statute." *Id.* at 477 & n.11, 478. *See also Lora*, 804 F.3d at 615 (observing the "the pervasive inconsistency and confusion exhibited by district courts in [the Second] Circuit when asked to apply a reasonableness test on a case-by-case basis" prior to adoption of six-month limit). Several district courts in the Third Circuit have recently read Section 1226(c) as presumptively limiting mandatory detention to one year. *See, e.g.*, *Deptula v. Lynch*, No. 1:15-CV-2228, 2016 WL 98152, at *3 (M.D. Pa. Jan. 8, 2016) (ordering bond hearing for noncitizen whose detention "exceeds [the] one-year [] period of time which *Chavez-Alvarez* found to be presumptively excessive").

The First Circuit's recent *Reid* decision also illustrates that the circuits continue to encourage district courts to develop procedures for applying the "reasonableness" limitation needed to render mandatory detention under Section 1226(c) consistent with due process constraints. While the First Circuit followed the Third Circuit's path, it also enccouraged the district court and the agency to develop alternative approaches over time. *Reid*, 2016 WL 1458915, at *9 n.3; *id.* at *12 n.5. This Court would benefit by seeing the results of such approaches.

This perspective from the First Circuit and the Third Circuit's evolution mirrors the history of the

Ninth Circuit's time-based approach. The rule established in *Rodriguez* followed the Ninth Circuit's extended engagement with a system that lacked administrable rules governing the length of mandatory detention. The Court rejected prolonged mandatory detention nearly a decade before *Rodriguez III*, in *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005), but continued to see pervasive prolonged detention in the years following that decision. *See Nadarajah*, 443 F.3d at 1080 (noncitizen detained pending removal proceedings for nearly five years); *Casas-Castrillon v. DHS*, 535 F.3d 942, 944 (9th Cir. 2008) (detention without bond hearing for seven years while case pending); *Aguilar-Ramos v. Holder*, 594 F.3d 701, 704 n.3 (9th Cir. 2010) ("express[ing] grave concerns over Aguilar's four-year detention" while case pending); *Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011) (nearly four years). Having "grappled in piece-meal fashion" with the issue for a decade, App. 110a, the Ninth Circuit ultimately concluded that the statute was best read to requires hearings at six months.

3. The circuits' evolution demonstrates that a time-based limitation on Section 1226(c) is not only more faithful to Congressional design, *see infra* Sec. II.C., but also far more practical: it "provide[s] clear guidance and ease of administration to Government officials," *Lora*, 804 F.3d at 615; entrusts detention review to the immigration courts, which have the institutional competence and individualized knowledge to efficiently conduct the review; avoids duplicative review by the federal courts; and ensures that noncitizens—many of whom are unrepresented and lacking in the legal sophistication needed to file a habeas petition—are in fact able to obtain review of

whether their detention remains reasonable despite its length. *See id.* at 615-16; App. 48a.

B. The Practical Consequences Of The Ninth Circuit's Section 1226(c) Ruling Do Not Warrant This Court's Review.

1. The Government raises the specter of terrorism—asserting 21 times that the Ninth Circuit ruling applies to "terrorists"—but the *Rodriguez* Class specifically excludes noncitizens held under the national-security detention statutes. *See* Pet. 20 n.3. Those statutes explicitly authorize prolonged detention without bond hearings for national security detainees, but subject their cases to high-level review within the Department of Justice. *See* 8 U.S.C. 1226a(a); 8 U.S.C. 1531, *et seq.* The Government has never identified an individual charged as a terrorist in the Class since it was first certified in 2011, nor has it explained why the authority Congress specifically provided for prolonged mandatory detention in national security cases cannot suffice to protect its interests.

2. The Government suggests that the ruling will lead to the release of individuals who are dangers or flight risks by citing outdated statistics from *Demore*, Pet. 24, but those statistics do not concern the prolonged detainees at issue here. Moreover, record evidence demonstrates that Section 1226(c) Subclass members prevail in their immigration cases at remarkably high rates, and that many have minor criminal histories. *See supra* at 10-11.[7]

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[7] Should this Court grant *certiorari*, Respondents will defend the Ninth Circuit's decision on the alternative ground that individuals who remain eligible for relief from removal or have other substantial defenses are not "deportable," and therefore not subject to mandatory detention. *See Gonzalez v. O'Connell*,

Furthermore, since *Demore*, the Government has adopted new, sophisticated alternatives to detention that have proven effective in preventing recidivism and flight. *See* Deposition Transcript of Eric G. Saldana, No. 13-56706, Dkt. 122 (hereinafter "Saldana Dep.") at SER 181:2-24 (Government witness testimony that programs are close to 100% effective in some regions).

Similarly, the Government's citation to generalized data about *in absentia* orders (Pet. 27) is irrelevant to this case because it is nationwide data that includes people released by ICE and individuals released on a bond set by an Immigration Judge at the outset of their detention, rather than data about prolonged detainees released by Immigration Judges in the Ninth Circuit. For these and other reasons, the Ninth Circuit expressly held that reliance on the Government's *in absentia* data was unjustified on this record.[8]

3. The Government asserts that the Ninth Circuit's ruling creates an incentive for noncitizens to engage in "dilatory and obstructive tactics" by seeking frivolous continuances, Pet. 18, but this concern is misguided. Regulations require that a

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355 F.3d 1010, 1019-20 (7th Cir. 2004) ("[*Demore*] left open the question of whether mandatory detention under § 1226(c) is consistent with due process when a detainee makes a colorable claim that he is not in fact deportable.").

[8] The Ninth Circuit denied the Government's request for judicial notice of a prior edition of the EOIR Statistical Yearbook, a source of data on which the Government now relies. After Respondents raised significant questions about the accuracy, reliability, and relevance of the statistics, the Ninth Circuit declined to notice them, finding that they were "subject to reasonable dispute." *See* Request for Judicial Notice Order, No. 13-56706, Dkt. 133, at 6-7.

continuance be granted only for "good cause," 8 C.F.R. 1003.29, and contrary to the Government's suggestion, the Ninth Circuit has not altered this rule to require Immigration Judges "to grant multiple continuances" regardless of whether they are justified. Pet. 18. The Ninth Circuit has issued numerous decisions upholding continuance denials where the noncitizen failed to establish "good cause," including requests for more than one continuance. *See Sandoval-Luna v. Mukasey*, 526 F.3d 1243, 1247 (9th Cir. 2008) (per curiam) (upholding denial of second continuance); *Claudio-Alas v. Holder*, 594 F. App'x 360, 361 (9th Cir. 2015) (mem.) (same); *Rodarte-Rodarte v. Holder*, 529 F. App'x 830, 831 (9th Cir. 2013) (mem.) (same); *Matias v. Holder*, 402 F. App'x 241 (9th Cir. 2010) (mem.) (same).

Regardless, all of the Government's concerns can be addressed at the hearings conducted to determine whether detention remains justified. In the event that a noncitizen engages in "dilatory and obstructive tactics," the Immigration Judge should take such conduct into account and deny the individual's release. If an individual poses a danger, he should be denied release on that basis. The fact the Government may have good reason to detain *some* Class members is not a valid basis to deny *all* Class members—including those like Mr. Rodriguez whose detention is unwarranted—any opportunity to request release.

4. The Government's unsupported claim that the Ninth Circuit's ruling creates excessive burdens on the immigration courts, Pet. 31-32, cannot be reconciled with the fact that prolonged detainees constitute a small percentage of the overall immigration court docket, or with the sworn testimony of a supervisory Immigration Judge that

the immigration courts are well-equipped to handle a significant increase in hearings in detained cases. *See* Opposition to Emergency Motion to Stay Preliminary Injunction, No. 12-56734, Dkt. 3-1, at 11-13; *id.* Dkt. 3-3 (Exhibit 2, excerpts of Fong Dep.). Nor is there record evidence suggesting that burdens have appreciably increased in the Ninth Circuit since the injunctions went into effect.

C. The Ninth Circuit's Section 1226(c) Ruling Involves A Straightforward Application Of Settled Law.

1. This Court has recognized that immigration detention, like other forms of non-punitive incarceration, must "bear[] a reasonable relation to [its] purpose," *Zadvydas*, 533 U.S. at 690-91 (alteration omitted), because noncitizens have a liberty interest in freedom from immigration detention. *Zadvydas* involved a detainee who had already lost the right to remain in the country, and thus was in "a position far different from aliens with a lawful right to remain here," as is true of many members of the Section 1226(c) Subclass. *Id.* at 720 (Kennedy, J., dissenting). Prolonged incarceration without the right *even to ask* for release on bond, particularly for a detainee pursuing a substantial defense, surely constitutes a significant deprivation of liberty.

2. The Government acknowledges that *Demore v. Kim*, 538 U.S. 510 (2003), on which it heavily relies to justify the prolonged detention at issue here, referenced the brevity of the detention it upheld, Pet. 21, but does not explain how its practice of prolonged mandatory detention comports with that limitation. *See* 538 U.S. at 513 (holding detention permissible for the "brief period necessary for . . . removal proceedings."); *id.* at 529 n.12 (noting "[t]he very limited

time of the detention at stake under § 1226(c)"); *see also id.* at 532-33 (Kennedy, J., concurring) ("respondent could be entitled to an individualized determination . . . if the continued detention became unreasonable or unjustified"). All Class members at issue here have been incarcerated for six months or more, significantly longer than the brief time periods this Court considered in *Demore*: "roughly a month and a half in the vast majority of cases in which [Section 1226(c)] is invoked, and about five months in the minority of cases in which the alien chooses to appeal." *Id.* at 530. *Compare* Long Rep. at ER 685, tbl.6 (average detention time for Class members before immigration court was 330 days, for Class members before the BIA 448 days, and for Class members at the Ninth Circuit 667 days).[9]

3. That Section 1226(c) is insufficiently clear to authorize prolonged mandatory detention also follows from the *statutory* holding of *Zadvydas*. *Zadvydas* construed 8 U.S.C. 1231(a)(6), which authorizes post-final order detention, to authorize detention for a presumptively-reasonable six month period. 533 U.S. at 701. Although the statute contains no explicit temporal limitation, the Court found the absence of any explicit directive to authorize prolonged

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[9] The Government is correct that the detainee in *Demore* was detained for six months prior to the habeas court granting relief, 538 U.S. at 530-31, but he did not argue that the statute did not authorize his detention because of its length. Instead, the Court construed his petition as having conceded that the statute authorized his detention, *id.* at 513-14, because he argued that even brief detention without a bond hearing was unconstitutional. The Government argued that the Court should leave for another day cases involving prolonged detention "because prolonged detention imposes a greater burden upon the alien." *See* Brief for the Petitioner at 48, *Demore*, No. 01-1491 (filed Aug. 29, 2002).

detention dispositive. *Id.* at 697 ("[I]f Congress had meant to authorize long-term detention of unremovable aliens, it certainly could have spoken in clearer terms."); *see also id.* at 689, 699.

4. Subsequent legislative history confirms the correctness of that approach. Congress has had multiple opportunities to overrule the Ninth Circuit's interpretation of Section 1226(c) since it was first adopted in 2005, but each time has declined to do so.[10] Congress's inaction belies the Government's claims that the Ninth Circuit's ruling is contrary to Congressional intent.

Because Section 1226(c) does not specify its temporal scope, this Court should not read it to implicitly authorize prolonged detention, particularly when Congress has explicitly authorized such detention in other statutes.

III. THE PROTECTIONS ORDERED BY THE NINTH CIRCUIT AT PROLONGED DETENTION HEARINGS DO NOT WARRANT CERTIORARI.

Review by this Court is not warranted to address the procedures the Ninth Circuit ordered for noncitizens facing detention beyond six months.

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[10] *See, e.g.*, Keep Our Communities Safe Act of 2011, H.R. 1932, 112th Cong. (2011), https://www.congress.gov/bill/112th-congress/house-bill/1932/text; Keep Our Communities Safe Act of 2013, H.R. 1901, 113th Cong. (2013), https://www.congress.gov/bill/113th-congress/house-bill/1901/text?q=%7B"search"%3A%5B"%5C"lamar+smith%5C""%5D%7D; Inhofe Amendment, Justice for Victims of Trafficking Act of 2015, S.Amdt. 275 to S. 178, 114th Cong. (2015-2016), https://www.congress.gov/amendment/114th-congress/senate-amendment/275/text. Four similar bills were introduced in either the House or Senate since 2011.

A. All Circuits To Consider The Issue Have Agreed That The Government Bears The Burden Of Proof In Hearings Involving Prolonged Detention.

1. No circuit has adopted a view contrary to the Ninth Circuit as to the burden or standard of proof necessary to justify prolonged detention. Among the five circuits that have recognized the need for hearings when detention becomes unreasonably prolonged, three have resolved the question of which party bears the burden at those hearings, and all agree that the government must bear it. *See Lora*, 804 F.3d at 615-16, *Diop*, 656 F.3d at 235, *Tijani*, 430 F.3d at 1242. Two circuits have addressed what standard of proof applies, and both agree that the government must show danger and flight risk by clear and convincing evidence. *See Lora*, 804 F.3d at 615-16, *Singh*, 638 F.3d at 1203.

The circuits' consistent rulings flow from this Court's precedent. "[D]ue process places a heightened burden of proof on the State in civil proceedings in which the 'individual interests at stake . . . are both "particularly important" and "more substantial than mere loss of money."'" *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) (omission in original) (quoting *Santosky v. Kramer*, 455 U.S. 745 (1982)). Because "[f]reedom from imprisonment," lies "at the heart of the liberty interest" that the Due Process Clause protects, *Zadvydas*, 533 U.S. at 690, the Government must bear the burden of proof by clear and convincing evidence. *See, e.g.*, *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (commitment of insanity acquitee); *Woodby v. INS*, 385 U.S. 276, 285 (1966) (deportability); *Chaunt v. United States*, 364 U.S. 350, 351 (1960) (denaturalization).

Indeed, in rejecting prolonged post-final-order detention in *Zadvydas*, the Court relied on the fact that "the sole procedural protections . . . are found in administrative proceedings where *the alien bears the burden of proving he is not dangerous*." *Zadvydas*, 533 U.S. at 692 (emphasis added). And in upholding confinement in the civil commitment and pretrial detention contexts—to which *Zadvydas* analogized—this Court has recognized that the Government must justify detention by clear and convincing evidence. *See United States v. Salerno*, 481 U.S. 739, 751 (1987); *Addington v. Texas*, 441 U.S. 418, 432 (1979).[11]

The Government also relies on *Zadvydas*' purported placement of the burden on the detainee to show, in habeas, that "there is no significant likelihood of removal." Pet. 26-27. But, as *Zadvydas* recognized, there is a distinction between the procedures required to justify prolonged detention under the Due Process Clause, and what a detainee must show to bring a habeas petition. The Government has an obligation to provide hearing procedures that accord with constitutional constraints whether or not a detainee files a habeas petition.

2. No circuits have rejected the Ninth Circuit's conclusions (1) that the length of past detention must be considered as a factor at hearings to justify prolonged detention, and (2) that hearings must occur automatically every six months. The Court's analysis

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[11] The Government relies on regulations and BIA cases to argue that the Ninth Circuit "turned [the] scheme on its head" by placing the burden of proof on the Government to justify prolonged detention. Pet. 5-6, 8-9, but the regulations governing Immigration Judge bond hearings do not mention any burden of proof, and neither the regulations nor BIA precedent address prolonged detention. 8 C.F.R. 236.1(d)(1), 1236.1(d)(1).

in *Zadvydas* demonstrates why those rulings are correct. *Zadvydas* recognized that the deprivation of liberty grows as detention continues. *See Zadvydas*, 533 U.S. at 701 (reasoning, in post-final-order context, that "for detention to remain reasonable, as the period of . . . confinement grows" the permissible length of future detention "conversely would have to shrink"). It follows that a greater deprivation of liberty requires a stronger governmental justification, such that Immigration Judges must consider the length of detention when determining whether confinement remains justified.

Substantial record evidence supports the Ninth Circuit's decision to order that the hearings for prolonged detainees occur automatically on a periodic basis. As the Ninth Circuit observed: "[d]etainees, who typically have no choice but to proceed *pro se*, have limited access to legal resources, often lack English-language proficiency, and are sometimes illiterate." App. 48a. The Ninth Circuit found that "many class members are not aware of their right to a bond hearing and are poorly equipped to request one." *Id.* Under these circumstances, automatic hearings protect against the risk of erroneous deprivation that might otherwise result. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The Ninth Circuit's procedural requirements impose a minimal burden on the Government. The Government stipulated below that it would not argue that "the cost of providing a bond hearing should be considered in this case as a factor weighing in favor of [the Government]." Joint Stipulation, No. 13-56706, Dkt. 122, at SER 191. Under these circumstances, there is no need for the Court to grant certiorari to review the Ninth Circuit's rulings regarding procedures for prolonged detention review hearings.

B. Neither The Immigration Laws Nor Applicable Regulations Prohibit The Prolonged Detention Hearings Ordered By The Ninth Circuit.

The Ninth Circuit held that prolonged detention review hearings occur under 8 U.S.C. 1226(a). App. 35a, 40a. That statute and its implementing regulations are silent as to what procedures apply in prolonged detention cases. *See* 8 C.F.R. 236.1(d)(1), 1236.1(d)(1). Both should be construed to permit the constitutionally necessary protections the Ninth Circuit ordered, principally a hearing at six months where the Government bears the burden to demonstrate, by clear and convincing evidence, that continued detention is justified in light of its length. If the statute or regulations were read to permit prolonged detention without these protections, they would raise serious constitutional problems under this Court's precedent.

The Government argues that the Ninth Circuit's decision "represents a radical departure" from the statute and regulations. Pet. 10. But none of the statutory or regulatory provisions address what procedures are necessary to justify prolonged detention. Section 1226(c) provides the framework for detention when removal proceedings are of a "shorter duration," *Demore*, 538 U.S. at 528, but says nothing as to prolonged detention. Likewise, the regulations merely state that, after DHS makes a determination about whether to detain an individual, the noncitizen "may . . . request amelioration of the conditions under which he or she may be released" before an Immigration Judge. 8 C.F.R. 236.1(d)(1), 1236.1(d)(1). Nowhere do these provisions address procedures in detention review hearings at all, let alone the procedures applicable to prolonged detention cases.

The Ninth Circuit properly construed these provisions to avoid the constitutional problem that would otherwise be created. *See, e.g.*, *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953) (construing immigration regulations to avoid constitutional problems).[12]

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[12] The Government argues for *Chevron* deference, *see* Pet. 26, but no deference is warranted when an interpretation raises constitutional problems, as this Court's recent immigration detention cases make clear. *See, e.g.*, *Zadvydas*, 533 U.S. at 695 (rejecting argument that "the Judicial Branch must defer to Executive and Legislative Branch decisionmaking in" the immigration context because "that power is subject to important constitutional limitations").

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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In the Supreme Court of the United States

DAVID JENNINGS, ET AL., PETITIONERS

v.

ALEJANDRO RODRIGUEZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The Ninth Circuit's wholesale revision of the law governing immigration detention during removal proceedings warrants this Court's review. First, the court rewrote the law governing detention of criminal and terrorist aliens in removal proceedings who "shall" be taken into custody and may be released "only if" a narrow witness-protection exception is satisfied. 8 U.S.C. 1226(c). In the face of those explicit requirements, the Ninth Circuit crafted a sweeping new exception that would allow such criminal or terrorist aliens to be released after a bond hearing if detention lasts for six months. Second, the court of appeals rewrote the law governing detention of aliens seeking admission to the United States, allowing aliens who have not clearly established their admissibility nevertheless to obtain release on bond after six months—and thus a right to enter the interior over the objection of the Secretary of Homeland Security—for the first time in our Nation's history. Third, the

court rewrote the procedures in bond hearings themselves. For aliens detained for six months, the court shifted the burden of proof to the government, demanded clear and convincing evidence, required repeat hearings automatically every six months, and even changed the factors to be considered in bond hearings. The court greatly overstepped the judicial role, and disregarded this Court's precedents in multiple ways. This Court should grant certiorari and reverse.

A. The Ninth Circuit's Revision Of Section 1226(c) Warrants Review

The court of appeals' holding that mandatory detention under Section 1226(c) is capped at six months warrants this Court's review.

1. As respondents recognize (Br. in Opp. 21), the "circuits differ" as to whether a six-month cap must be imposed on detention of aliens under Section 1226(c). Respondents call for "percolat[ion]" (*id.* at 20), suggesting that this split may narrow. In fact, it has recently widened: The First Circuit has just joined the Third and Sixth Circuits in interpreting Section 1226(c) to authorize mandatory detention for a reasonable time, rejecting the rigid six-month cap imposed by the Second and Ninth Circuits. *Reid* v. *Donelan*, No. 14-1270, 2016 WL 1458915, at *9 (Apr. 13, 2016). The First Circuit concluded that "the Third and Sixth Circuits' individualized approach adheres more closely to legal precedent than the extraordinary intervention" of the rigid six-month rule. *Ibid.* The Third Circuit has also repeatedly rejected the Ninth Circuit's approach. See *Chavez-Alvarez* v. *Warden York Cnty. Prison*, 783 F.3d 469, 474 n.7 (2015) ("We declined to adopt presumptive thresholds in both *Diop*

and *Leslie*, and we decline to do so now."). The 3-2 split here thus will not be resolved without this Court's intervention.

2. Respondents do not even try to square the Ninth Circuit's rigid six-month cap with Section 1226(c)'s text, history, purpose, or context. Instead, respondents rely solely on constitutional avoidance, arguing (Br. in Opp. 28) that Section 1226(c) is "insufficiently clear" to authorize what they characterize as "prolonged" mandatory detention. But Section 1226(c) unambiguously provides that the Secretary is prohibited from releasing a criminal or terrorist alien detained under that provision based merely on the passage of time: the Secretary "shall" take such an alien into custody, and "may release" the alien "*only if*" the narrow witness-protection exception is satisfied. 8 U.S.C. 1226(c)(1) and (2) (emphasis added). Congress further confirmed that bar to release in Section 1226(a), providing that aliens in removal proceedings generally may be released on bond—"except as provided in subsection (c)." 8 U.S.C. 1226(a); see 8 U.S.C. 1226(a)(2).

Respondents contend (Br. in Opp. 26) that "all of the Government's concerns" about recidivism and flight can be addressed in the bond hearings the Ninth Circuit ordered, where an immigration judge may deny bond "[i]f an individual poses a danger" or flight risk. But Congress enacted Section 1226(c) specifically to take that determination out of the hands of immigration judges, responding to real-world experience showing that this approach did not protect against flight and recidivism. See *Demore* v. *Kim*, 538 U.S. 510, 518 (2003) (describing the "wholesale failure" of that approach). Congress replaced that individualized

scheme with a categorical judgment that all aliens who are convicted of qualifying criminal offenses pose a danger and undue flight risk and thus may be released "only if" a narrow witness-protection exception applies. 8 U.S.C. 1226(c)(2).

In *Demore*, this Court upheld Congress's categorical judgment as applied to a lawful permanent resident (LPR) who had "spen[t] six months in INS custody." 538 U.S. at 531. That leaves no room for the proposition that criminal aliens cannot be detained for six months without an individualized hearing. Respondents note (Br. in Opp. 28 n.8) that the alien in *Demore* did not argue for a six-month cap. But the fact that *Demore* was fully litigated without anyone even noticing such a cap's supposed existence further underscores that the six-month rule has no basis in the statutory text or purpose. And to the extent the Ninth Circuit relied on *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), to impose a six-month cap, see Br. in Opp. 27-29; Pet. App. 28a-31a, this Court in *Demore* specifically *rejected* the alien's reliance on *Zadvydas*. See 538 U.S. at 527-529; see Pet. 21. In doing so, this Court explained that, unlike in *Zadvydas*, detention during removal proceedings "necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings" and has an "obvious termination point" at the entry of a final order of removal. 538 U.S. at 528-529. Those bases for mandatory detention do not disappear after six months.

Respondents emphasize (Br. in Opp. 7) that the average detention time for class members was 404 days. But averages for class members are skewed upwards by the fact that an alien is only a class member if he

has been detained for at least six months. The "average" thus omits every alien released in less time.

Respondents also fail to differentiate delays caused by aliens. On average, alien-requested continuances accounted for 105.9 days of pre-order detention by class members; and 22.7% of class members requested continuances totaling 181 days or more. E.R. 175, 186. This means that, under the court of appeals' rigid six-month rule, approximately *a fifth of class members* are entitled to release based solely on their own delay, unless the *government* can prove flight risk or danger by clear and convincing evidence. The Congress that prescribed mandatory detention under Section 1226(c) in 1996 did not at the same time open up such a loophole.

B. The Ninth Circuit's Revision Of Section 1225(b) Warrants Review

This Court should similarly review the Ninth Circuit's imposition of a six-month cap on mandatory detention under 8 U.S.C. 1225(b). The Ninth Circuit fashioned a right for inadmissible aliens seeking admission to be released into the interior of this country if their removal proceedings last for six months—no matter the reason for the delay—and the government is unable to prove, by clear and convincing evidence, that they will not flee or be a danger to the community. That holding has no basis in the Constitution or any statute or regulation, and radically breaks from longstanding legal principles governing protection of the Nation's borders.

1. Respondents again rely solely on the canon of constitutional avoidance, this time based on speculation about the possibility of a rare case in which a returning LPR might be detained for more than six

months under Section 1225(b). See Br. in Opp. 13-16. But Section 1225(b)'s text, structure, context, and history cannot fairly be read to impose a categorical rule requiring bond hearings at the six-month mark. Throughout the history of United States immigration law, Congress has never provided bond hearings for aliens detained at the threshold of entry to the country pending the outcome of proceedings to exclude them. Consistent with that unbroken tradition, Congress has provided that aliens who are seeking admission, but who are "not clearly and beyond a doubt entitled to be admitted," "shall be detained" for removal proceedings. 8 U.S.C. 1225(b)(2)(A). And arriving aliens in expedited removal proceedings "shall" be removed without a hearing or "shall be detained" pending a credible-fear determination; "shall be detained" until removed if they lack such a fear; and "shall be detained" pending consideration of asylum if they have such a fear. 8 U.S.C. 1225(b)(1)(A)(i), (B)(ii), (iii)(I), and (IV).

Controlling regulations in turn provide that arriving aliens in removing proceedings "shall be detained" and that immigration judges in the Department of Justice's Executive Office for Immigration Review "may not" hold bond hearings for them. 8 C.F.R. 235.3(c), 1003.19(h)(2)(i)(B), 1235.3(c). Instead, an arriving alien who has not established his admissibility may be released only by the Secretary of Homeland Security, pursuant to his distinct discretionary parole authority under 8 U.S.C. 1182(d)(5); see 8 C.F.R. 212.5(b) and (c), 235.3(b)(4)(ii) and (c).

The possible release of such aliens into the country through bond hearings before an immigration judge after six months also would subvert Congress's pur-

pose of giving the Secretary "the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens." 8 U.S.C. 1103(a)(5). Even assuming that there might be a constitutional doubt raised in a rare case involving an LPR, respondents' rigid across-the-board "solution" dwarfs the size of any potential constitutional doubt, and in any event is unnecessary because an as-applied constitutional challenge would be available in that rare situation.

Any doubt concerning the constitutionality of Section 1225(b)'s mandatory-detention provisions could arise, at most, in a tiny fraction of cases. Respondents do not dispute that Section 1225(b) is valid as applied to "likely the vast majority" of subclass members. Pet. App. 86a. Respondents point (Br. in Opp. 14-15) to the possibility that an LPR returning from abroad could be detained for more than six months during removal proceedings. But in *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), this Court upheld the detention of a returning LPR at the border for 21 months without any hearing. See Pet. 10, 12, 15-16. And in any event, LPRs generally are exempt from detention under Section 1225(b), subject only to narrow exceptions that Congress crafted against the settled backdrop of *Mezei*. See 8 U.S.C. 1101(a)(13)(C). The court of appeals in turn found that the record included zero examples of LPR class members actually detained under Section 1225(b); respondents assert (Br. in Opp. 16) that the correct number is one. Either way, the number of clearly valid applications overwhelms respondents' asserted example, even assuming it raised a serious constitutional question despite *Mezei*. Cf. *id.* at 6 (discussing

statistical sampling of "approximately 1,000" class members).

Respondents' six-month limitation is also unnecessary to address the concerns they raise. If a returning LPR is detained under the narrow circumstances identified in 8 U.S.C. 1101(a)(13)(C)—and if *Mezei* has not already foreclosed a constitutional challenge, if alien-caused delay or other factors did not reasonably justify the time for conducting removal proceedings, and if the Secretary has not addressed the situation through an exercise of parole authority—that alien could raise an as-applied constitutional challenge through habeas corpus and, if the alien prevailed, could obtain a tailored remedy. But Congress surely did not intend to enact a massive loophole through the core of Section 1225(b), depriving the Secretary of plenary control over the border and providing a windfall to thousands of aliens whose detention is perfectly valid, based on speculation about potential constitutional issues that might arise in a tiny fraction of cases and that could be resolved without creating that loophole in the first place.

Respondents contend (Br. in Opp. 1, 13) that the six-month cap is "dictated" by *Clark* v. *Martinez*, 543 U.S. 371, 378 (2005). But *Clark*'s statement that "[t]he lowest common denominator, as it were, must govern," *id.* at 380, does not establish that, whenever a litigant identifies any potential for a constitutional problem—no matter how rare—courts should rewrite the entire statute to avoid the problem at all costs. That passage merely describes the effect of having previously given the statute at issue a limiting construction in a case involving possible constitutional concerns: That construction applies in subsequent

cases, even absent the constitutional concerns that prompted it. *Id.* at 378.

The question here is instead *whether* Section 1225(b) must be given the Ninth Circuit's counter-textual and profoundly counter-historical limiting construction in the first place. *Clark* elsewhere teaches that constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." 543 U.S. at 381. "The canon is thus a means of giving effect to congressional intent, not of subverting it." *Id.* at 382. Accordingly, even if one application could be doubtful, the statute should not be construed to avoid the potential problem if (1) the proposed limitation is not a plausible interpretation of statutory ambiguity; or (2) the presumption that Congress ordinarily intends to avoid constitutional problems is overcome because the limitation would subvert—rather than effectuate—Congress's intent. As set forth above, the court of appeals' rigid six-month rule fails both steps.

2. Respondents contend (Br. in Opp. 2) that it is "hyperbolic" for the government to be concerned that the court of appeals has wrested control of the border from the Secretary and given inadmissible aliens a right to a hearing before an immigration judge—and to enter the country if the government cannot satisfy the high burden of proof the Ninth Circuit has imposed on it. But "[i]t is axiomatic that the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity." *United States* v. *Flores-Montano*, 541 U.S. 149, 153 (2004). One aspect of the

Executive's plenary authority over the border is that "an alien who seeks admission to this country may not do so under any claim of right"; rather, "admission is a privilege granted by the sovereign United States Government" and "only upon such terms" and "in accordance with the procedure which the United States provides." *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950). The Ninth Circuit's sharp break from those foundational principles, firmly established in our immigration laws and jurisprudence, is itself extraordinarily important.[1]

Furthermore, a concrete impact is already being felt. Respondents trumpet (Br. in Opp. 11-12) that approximately 70% of aliens (across all subclasses) are granted bond after *Rodriguez* hearings, and approximately 70% of those post bond and are released. But that simply illustrates the practical impact of the ruling below. None of those aliens were otherwise entitled to a bond hearing, and approximately one

---

[1] Respondents contend (Br. in Opp. 19) that the government "is *already* providing bond hearings" to certain Section 1225(b) subclass members. (citing *In re X-K-*, 23 I. & N. Dec. 731, 734-735 (B.I.A. 2005)). But *X-K-* does not address aliens newly arriving at ports of entry; it addresses "certain other aliens" who already crossed the border without inspection, were encountered within 14 days and 100 miles of the border, and then passed a credible fear interview. *Id.* at 732-733; see 8 U.S.C. 1225(b)(1)(A)(iii). *X-K-* rested on a perceived "regulatory gap" in that situation, not any broader principle. 23 I. & N. Dec. at 735. By contrast, the Ninth Circuit's ruling newly gives immigration judges the power (and, by shifting the burden to the government, presumptively requires immigration judges) to allow inadmissible aliens to enter the country over the Secretary's objection. And *X-K-* observed that "[t]here is *no question* that Immigration Judges lack jurisdiction over arriving aliens who have been placed in * * * removal proceedings." *Id.* at 732 (emphasis added).

third of aliens overall who are released on bond fail to appear. See Pet. 27.

C. The Ninth Circuit's Revision Of Bond-Hearing Procedures Warrants Review

Finally, the Court should grant certiorari to review the court of appeals' holdings that the government must bear the burden of proof at bond hearings on flight risk and danger and do so by clear and convincing evidence, that periodic bond hearings must occur automatically, and that immigration judges must consider detention length as a factor. This radical revision of the procedures that have long governed bond hearings is itself of great importance and is intertwined with review of the six-month caps imposed by the Ninth Circuit, as that revision amplifies the real-world impact of mandating bond hearings.

The court of appeals' procedural innovations are contrary to Section 1226(c) and longstanding regulations. Respondents contend (Br. in Opp. 33) that Section 1226(c) "says nothing as to prolonged detention." But Section 1226(c) plainly covers detention for the entire duration of removal proceedings: The Secretary "may release" a covered alien during removal proceedings "only if" the witness-protection exception is satisfied. 8 U.S.C. 1226(c)(2). And to satisfy even that narrow exception, the burden is on "the alien"—not the government. *Ibid.*

Respondents similarly assert (Br. in Opp. 33) that the regulations establishing procedures for bond hearings—where they are available at all—do not address "prolonged detention." But the regulations unambiguously apply in *all* bond determinations. Comprehensive regulations entitled "Apprehension, custody, and detention" state that DHS officers "may" release an

alien detained under Section 1226(a) on bond, "provided that *the alien* must demonstrate" he is not a flight risk or danger. 8 C.F.R. 236.1(c)(8), 1236.1(c)(8) (emphasis added). After such an initial custody determination, "including the setting of a bond," the alien may ask an immigration judge to ameliorate "the conditions under which he or she may be released," and the immigration judge "is authorized" to detain the alien, "release the alien," and "determine the amount of bond, if any." 8 C.F.R. 236.1(d)(1), 1236.1(d)(1). And aliens do not obtain subsequent hearings automatically; they must show that "circumstances have changed materially." 8 C.F.R. 1003.19(e). The Ninth Circuit did not construe those provisions. It invalidated them and wrote new rules in their place.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

MAY 2016

RECORD
& AND
BRIEF

Supreme Court, U.S.
FILED
AUG 26 2016
OFFICE OF THE CLERK

No. 15-1204

In the Supreme Court of the United States

DAVID JENNINGS, ET AL., PETITIONERS

v.

ALEJANDRO RODRIGUEZ, ET AL.,
INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: MAR. 25, 2016
CERTIORARI GRANTED: JUNE 20, 2016

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 08-56156

ALEJANDRO RODRIGUEZ, PETITIONER-APPELLANT

v.

JAMES HAYES, ET AL., RESPONDENTS-APPELLEES

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
7/17/08	1	Filed order (EDWARD LEAVY and SANDRA S. IKUTA) (Filed on 7-17-2008 in case no. 08-80055). The court , in its discretion, grants the petition for permission to appeal the district court's March 19, 2008 order denying class action certification. See Fed. R. Civ. P. 23(f). * * *
		* * * * *
8/20/09	23	FILED OPINION (BETTY BINNS FLETCHER, RAYMOND C. FISHER and RONALD M. GOULD) REVERSED AND REMANDED. Judge: BBF Authoring, Judge: RCF , Judge: RMG . FILED AND ENTERED JUDGMENT. [7034175] (PH) [Entered: 08/20/2009 08:51 AM]

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
1/4/10	29	Filed order and amended opinion (BETTY BINNS FLETCHER, RAYMOND C. FISHER and RONALD M. GOULD). The opinion filed on August 20, 2009 and published at 578 F.3d 1032 (9th Cir. 2009) is hereby amended. The amended opinion is filed simultaneously with this order. With the amendment, the panel has voted to deny the petition for panel rehearing. Judges Fisher and Gould have voted to deny the petition for rehearing en banc and Judge B. Fletcher so recommends. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. Accordingly, the petition for panel rehearing and the petition for rehearing en banc are denied. * * *
		* * * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 12-56734

ALEJANDRO RODRIGUEZ, ET AL.,
PETITIONERS-APPELLEES

v.

TIMOTHY ROBBINS, ET AL., RESPONDENTS-APPELLANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
9/21/12	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. * * *
9/21/12	2	Filed (ECF) Appellants Russell Davis, Arthur Edwards, Eric H. Holder, Jr., Sandra Hutchens, Mike Kreuger, Wesley Lee, Janet Napolitano, Nguyen, Davis Nighswonger, Juan P. Osuna, Rodney Penner and Timothy Robbins EMERGENCY Motion to stay lower court action. Date of service: 09/21/2012. [8333645] (Atkinson, Theodore) [Entered: 09/21/2012 04:56 PM]
		* * * * *
9/25/12	4	Filed order (BETTY BINNS FLETCHER, RAYMOND C. FISHER

DATE	DOCKET NUMBER	PROCEEDINGS
		and RONALD M. GOULD) Respondents' emergency motion is denied. The panel will stay the district court's injunction until October 13, 2012. Respondents now have until November 12, 2012 to comply with the district court's injunction. [8336078] (TSP) [Entered: 09/25/2012 09:45 AM]
		* * * * *
4/16/13	48	FILED OPINION (KIM MCLANE WARDLAW, RONALD M. GOULD and SAM E. HADDON) AFFIRMED. Judge: KMW Authoring,. FILED AND ENTERED JUDGMENT. [8591143] (DD) [Entered: 04/16/2013 09:43 AM]
		* * * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 13-56706

ALEJANDRO RODRIGUEZ, ET AL.,
PETITIONERS-APPELLEES

v.

TIMOTHY ROBBINS, ET AL., RESPONDENTS-APPELLEES

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
10/1/13	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. * * *
		* * * * *
10/9/13	3	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL ON CROSS-APPEAL. * * *
		* * * * *
10/28/15	133	Filed order (KIM MCLANE WARDLAW, RONALD M. GOULD and SAM E. HADDON) This order resolves several pending motions to strike, to take judicial notice, and to unseal documents. See Dkt. Nos. 23, 24, 56, 68, 69, 112. We consider

DATE	DOCKET NUMBER	PROCEEDINGS
		each motion in turn. (SEE ORDER FOR FULL TEXT) * * *
10/28/15	134	FILED OPINION (KIM MCLANE WARDLAW, RONALD M. GOULD and SAM E. HADDON) AFFIRMED IN PART, REVERSED IN PART AND REMANDED. Judge: KMW Authoring. FILED AND ENTERED JUDGMENT. [9735646] [13-56706, 13-56755] (RMM) [Entered: 10/28/2015 10:12 AM]
		* * * * *
6/21/16	144	Received notice from the Supreme Court. Petition for certiorari GRANTED on 06/20/2016. Supreme Court Number 15-1204. [10022573] [13-56706, 13-56755] (RR) [Entered: 06/21/2016 09:56 AM]
		* * * * *

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DISTRICT - LOS ANGELES

Docket No. 2:07-cv-03239-TJH-RNB

ALEJANDRO RODRIGUEZ, ET AL.,
PETITIONERS-APPELLEES

v.

TIMOTHY ROBBINS, ET AL., RESPONDENTS-APPELLEES

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
5/16/07	1	PETITION for Writ of Habeas Corpus by a Person In Federal Custody (28:2241) * * *
		* * * * *
06/25/07	7	ANSWER to Amended Petition for Writ of Habeas Corpus
		* * * * *
3/19/08	33	ORDER by Judge Terry J. Hatter Jr, that the Respondents' motion to dismiss 26 , the motion for class certification 10 and the ex parte application for a stay 30 be, and hereby are, Denied. (lom) (Entered: 03/21/2008)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
7/17/08	36	ORDER from 9th CCA filed, CCA # 08-80055. The court, in its discretion, grants the petition for permission to appeal the district court's 3/19/08 order denying class action certification. * * *
		* * * * *
8/20/09	47	ORDER from 9th CCA filed, CCA # 08-56156. We deny Petitioner Alejandro Rodriguez's Request for Judicial Notice as moot. DENIED. Order received in this district on 11/02/09. (lr) (Entered: 11/05/2009)
		* * * * *
10/15/10	101	NOTICE OF MOTION AND MOTION to Certify Class and Subclass filed by Plaintiffs Yussuf Abdikadir, Angel Armando Amaya, Jose Farias Cornejo, Abdirizak Aden Farah, Alejandro Rodriguez, Abel Perez Ruelas. * * *
		* * * * *
10/22/10	111	THIRD AMENDED COMPLAINT * * *
		* * * * *
11/15/10	122	NOTICE OF NON-OPPOSITION to MOTION to Certify Class and Subclass 101 filed by Respondents

DATE	DOCKET NUMBER	PROCEEDINGS
		Lee Baca, Russell Davis, Arthur Edwards, Eric Holder, Sandra Hutchens, Sammy Jones, Mike Kreuger, Wesley Lee, George Molinar, Janet Napolitano, Nguyen, Davis Nighswonger, Rodney Penner, Timothy Robbins, Thomas G Snow, Paul Walters. (Reuveni, Erez) (Entered: 11/15/2010)
		* * * * *
11/15/10	161	ORDER by Judge Terry J. Hatter, Jr: granting 101 Plaintiff's Motion for class certification. (see attached document for details.) (lom) (Entered: 03/09/2011)
		* * * * *
6/25/12	232	NOTICE OF MOTION AND MOTION for Preliminary Injunction.. * * *
		* * * * *
7/18/12	250	OPPOSITION to MOTION for Preliminary Injunction. * * *
		* * * * *
8/3/12	252	REPLY IN SUPPORT OF MOTION for Preliminary Injunction.. * * *
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
9/13/12	255	ORDER AND PRELIMINARY INJUNCTION by Judge Terry J. Hatter, Jr.: It is Ordered that Petitioners' Motion for Preliminary Injunction 232 is Granted. It is further Ordered that Respondents and their agents, employees, assigns, and all those acting in concert with them, are preliminarily enjoined as follows: Within thirty days of the date of this order, Respondents shall identify all members of the Section 1225(b) and Section 1226(c) Subclasses and provide each of them with a bond hearing before an Immigration Judge with power to grant their release. See document for details. (gk) (Entered: 09/13/2012)
		* * * * *
9/18/12	257	ORDER by Judge Terry J. Hatter, Jr. The Court has considered Respondents' 256 ex parte application for an emergency stay of the preliminary injunction pending appeal, together with the moving papers. IT IS ORDERED that the ex parte application be, and hereby is, DENIED. (ys) (Entered: 09/18/2012)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
9/21/12	259	NOTICE OF APPEAL to the 9th CCA filed by Respondents Russell Davis, Arthur Edwards, Eric Holder, Sandra Hutchens, Mike Kreuger, Wesley Lee, Janet Napolitano, Nguyen, Davis Nighswonger, Rodney Penner, Timothy Robbins, Thomas G Snow. Appeal of Order on Motion for Preliminary Injunction, 255* * * * * * * *
2/8/13	281	NOTICE OF MOTION AND MOTION for Summary Judgment filed by Petitioners Yussuf Abdikadir, Angel Armando Ayala, Jose Farias Cornejo, Abdirizak Aden Farah, Alejandro Rodriguez, Abel Perez Ruelas. * * * * * * * *
3/15/13	299	NOTICE OF MOTION AND MOTION for Summary Judgment as to as to all Claims filed by Respondents Russell Davis, Arthur Edwards, Eric Holder, Sandra Hutchens, Mike Kreuger, Wesley Lee, Janet Napolitano, Nguyen, Davis Nighswonger, Rodney Penner, Timothy Robbins, Thomas G Snow. * * * * * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
4/26/13	330	REPLY in Support MOTION for Summary Judgment as to as to all Claims 299 filed by Respondents Russell Davis, Arthur Edwards, Eric Holder, Sandra Hutchens, Mike Kreuger, Wesley Lee, Janet Napolitano, Nguyen, Davis Nighswonger, Rodney Penner, Timothy Robbins, Thomas G Snow. * * *
		* * * * *
5/3/13	334	SUPPLEMENT to MOTION for Summary Judgment 281 filed by Petitioners Yussuf Abdikadir, Angel Armando Ayala, Jose Farias Cornejo, Abdirizak Aden Farah, Efren Orozco, Alejandro Rodriguez, Abel Perez Ruelas. * * *
		* * * * *
5/6/13	336	NOTICE OF MOTION AND MOTION for Order for Clarification of the Class Definition filed by Petitioners Yussuf Abdikadir, Angel Armando Ayala, Jose Farias Cornejo, Abdirizak Aden Farah, Efren Orozco, Alejandro Rodriguez, Abel Perez Ruelas. * * *
		* * * * *
5/13/13	340	MEMORANDUM in Opposition to MOTION for Order for Clarification

DATE	DOCKET NUMBER	PROCEEDINGS
		of the Class Definition 336 filed by Respondents Russell Davis, Arthur Edwards, Eric Holder, Sandra Hutchens, Mike Kreuger, Wesley Lee, Janet Napolitano, Nguyen, Davis Nighswonger, Rodney Penner, Timothy Robbins, Thomas G Snow. * * *
5/20/13	341	REPLY in Support of MOTION for Order for Clarification of the Class Definition 336 filed by Petitioners Yussuf Abdikadir, Angel Armando Ayala, Jose Farias Cornejo, Abdirizak Aden Farah, Efren Orozco, Alejandro Rodriguez, Abel Perez Ruelas.* * *
		* * * * *
7/23/13	350	MANDATE of 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals, 259, CCA # 12-56734. The Judgment of the district court is Affirmed. Mandate received in this district on 7/23/13. (car) (Entered: 07/24/2013)
		* * * * *
8/6/13	353	ORDER, JUDGMENT AND PERMANENT INJUNCTION by Judge Terry J. Hatter, Jr.: The Court has considered Petitioners' motion to clarify the class definition 336. The Court certified the class in

DATE	DOCKET NUMBER	PROCEEDINGS
		this case after the Ninth Circuit held that the class must be certified. Rodriguez v. Hayes (Rodriguez I), 591 F.3d 1105 (9th Cir. 2010). It is further Ordered that Petitioners' motion for summary judgment 281 be, and hereby is, Granted. It is further Ordered that Respondents' motion for summary judgment 299 be, and hereby is, Denied. It is further Ordered, Adjudged and Decreed that Judgment be, and hereby is, Entered in favor of Petitioners and against Respondents. It is further Ordered that Respondents and their agents, employees, assigns, and all those acting in concert with them be, and hereby are, Permanently Enjoined, etc. See document for details re class definition and bond hearings. (gk) (Entered: 08/07/2013)
		* * * * *
9/30/13	360	NOTICE OF APPEAL to the 9th CCA filed by Respondents Russell Davis, Arthur Edwards, Eric Holder, Sandra Hutchens, Mike Kreuger, Wesley Lee, Janet Napolitano, Nguyen, Davis Nighswonger, Rodney Penner, Timothy Robbins, Thomas G Snow. Appeal of Order on Motion for Summary Judgment,,

DATE	DOCKET NUMBER	PROCEEDINGS
		Order on Motion for Order,,,,,,,,, 353 (Appeal fee FEE WAIVED.) (Atkinson, Theodore) (Entered: 09/30/2013)
		* * * * *
10/7/13	365	NOTICE OF APPEAL to the 9th CCA filed by Petitioners Yussuf Abdikadir, Angel Armando Ayala, Jose Farias Cornejo, Abdirizak Aden Farah, Efren Orozco, Alejandro Rodriguez, Abel Perez Ruelas. Appeal of Order on Motion for Summary Judgment * * *
		* * * * *
10/11/13	367	NOTICE OF MOTION AND MOTION for Order for Compliance with August 6, 2013 Order, Dkt. 353 filed by Petitioners Yussuf Abdikadir, Angel Armando Ayala, Jose Farias Cornejo, Abdirizak Aden Farah, Efren Orozco, Alejandro Rodriguez, Abel Perez Ruelas. * * *
		* * * * *
11/4/13	378	OPPOSITION to MOTION for Order for Compliance with August 6, 2013 Order, Dkt. 353 367 filed by Respondents Russell Davis, Arthur Edwards, Eric Holder, Sandra Hutchens, Mike Kreuger, Wesley

DATE	DOCKET NUMBER	PROCEEDINGS
		Lee, Janet Napolitano, Nguyen, Davis Nighswonger, Rodney Penner, Timothy Robbins, Thomas G Snow. * * *
		* * * * *
11/25/13	388	SUPPLEMENTAL BRIEF in Support of Petitioners' Motion for Compliance 367 filed by Petitioners Alejandro Rodriguez, Yussuf Abdikadir, Angel Armando Ayala, Jose Farias Cornejo, Abdirizak Aden Farah, Efren Orozco, Abel Perez Ruelas. (gk) (Entered: 11/26/2013)
		* * * * *
12/3/13	391	SUPPLEMENTAL BRIEF in Opposition to Petitioners' Motion for Compliance 367 filed by Respondents Timothy Robbins, Russell Davis, Arthur Edwards, Eric Holder, Sandra Hutchens, Mike Kreuger, Wesley Lee, Janet Napolitano, Nguyen, Davis Nighswonger, Rodney Penner, Thomas G Snow. (gk) (Entered: 12/04/2013)
		* * * * *
8/6/14	425	ORDER by Judge Terry J. Hatter, Jr.: Upon the Petitioner's Motion for Compliance 367 , the Court hereby orders as follows: Respondents

DATE	DOCKET NUMBER	PROCEEDINGS
		shall provide Petitioners with a draft Notice of Rodriguez Hearings on or before 8/18/2014. The parties shall either negotiate a mutually-acceptable revised Notice by 9/15/2014, or submit to the Court by that date competing Notice proposals from the parties for consideration by the Court. See document for further details. * * *
		* * * * *
10/2/15	458	ORDER from Ninth Circuit Court of Appeals filed * * *. The Order to Show Cause is discharged; no sanctions are imposed. IT IS SO ORDERED. (mat) (Entered: 10/02/2015)
10/28/15	459	OPINION from Ninth Circuit Court of Appeals filed * * *. We (9th CCA) reverse as to the § 1231(a) subclass, and we hold that IJs must consider the length of detention and provide bond hearings every six months. We hereby remand to the district court to enter a revised injunction consistent with our instructions. (mat) (Entered: 10/28/2015)
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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Case No. CV 07-3239-TJH (RNBx)

ALEJANDRO RODRIGUEZ, ABDIRIZAK ADEN FARAH, YUSSUF ABDIKADIR, ABEL PEREZ RUELAS, JOSE FARIAS CORENEJO, ANGEL ARMANDO AYALA, FOR THEMSELVES AND ON BEHALF OF A CLASS OF SIMILARLY-SITUATED INDIVIDUALS, PETITIONERS

v.

ERIC HOLDER, UNITED STATES ATTORNEY GENERAL; JANET NAPOLITANO, SECRETARY, HOMELAND SECURITY; THOMAS G. SNOW, ACTING DIRECTOR, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; TIMOTHY ROBBINS, FIELD OFFICE DIRECTOR, LOS ANGELES DISTRICT, IMMIGRATION AND CUSTOMS ENFORCEMENT; WESLEY LEE, OFFICER-IN-CHARGE, MIRA LOMA DETENTION CENTER; ET AL.; RODNEY PENNER, CAPTAIN, MIRA LOMA DETENTION CENTER; SANDRA HUTCHENS, SHERIFF OF ORANGE COUNTY; OFFICER NGUYEN, OFFICER-IN-CHARGE, THEO LACY FACILITY; CAPTAIN DAVIS NIGHSWONGER, COMMANDER, THEO LACY FACILITY; CAPTAIN MIKE KREUGER, OPERATIONS MANAGER, JAMES A. MUSICK FACILITY; ARTHUR EDWARDS, OFFICER-IN-CHARGE, SANTA ANA CITY JAIL; RUSSELL DAVIS, JAIL ADMINISTRATOR, SANTA ANA CITY JAIL, RESPONDENTS

Oct. 20, 2010

THIRD AMENDED COMPLAINT

JURISDICTION AND VENUE

1. Petitioners Alejandro Rodriguez, Abdirizak Farah, Yussuf Abdikadir, Jose Farias Cornejo, Abel Perez Ruelas, and Angel Ayala are non-citizens who have been subjected to prolonged incarceration at the hands of the Immigration and Customs Enforcement division of the Department of Homeland Security ("ICE"). Each of them has been incarcerated for more than six months while their immigration proceedings have been on-going without a hearing where the government has had to justify their prolonged detention. They challenge their prolonged detention without adequate process on statutory and constitutional grounds, on behalf of themselves and a class of similarly-situated detainees.

2. This Court has subject matter jurisdiction over these claims pursuant to 28 U.S.C. 2241 (habeas corpus), 28 U.S.C. 1651 (All Writs Act), and the Suspension Clause of Article I of the U.S. Constitution. *INS v. St. Cyr*, 533 U.S. 289, 304 (2001); *Demore v. Kim*, 538 U.S. 510, 516-17 (2003). This Court also has jurisdiction to hear this case under 28 U.S.C. 1331, which confers jurisdiction to consider federal questions. *Walters v. Reno*, 145 F.3d 1032, 1052 (9th Cir. 1998); *cf. Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005) (challenges to parole release procedures cognizable under Section 1983).[1]

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[1] This action is both a complaint for declaratory and injunctive relief under 28 U.S.C. 1331 and a petition for writ of habeas corpus under 28 U.S.C. 2241, although for ease of reference the complaint refers to "Petitioners" and "Respondents" rather than "Plaintiffs" and "Defendants."

3. This Court may grant relief under 28 U.S.C. 1331 (federal question), 28 U.S.C. 1651 (All Writs Act), 28 U.S.C. 2241 and 2243 (habeas corpus), and 28 U.S.C. 2201-02 (declaratory relief).

4. Venue is proper in the Central District of California pursuant to 28 U.S.C. 2241(d) because Petitioners and all other class members are incarcerated at Immigration and Customs Enforcement (ICE) detention facilities within this District. Venue is proper pursuant to 28 U.S.C. 1391(b) because a substantial part of the events giving rise to these claims occurred in this District.

* * * * *

FACTS AND PROCEDURAL HISTORY

Alejandro Rodriguez

33. Petitioner Alejandro Rodriguez was detained for over three years while he challenged the government's efforts to deport him to Mexico, a country where he has not lived since he was a baby.

34. Mr. Rodriguez came to this country in September 1979, when was one year old. He became a lawful permanent resident on June 4, 1987, when he was nine years old.[5]

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[5] Mr. Rodriguez narrowly missed becoming a citizen due to events beyond his control. He would have gained automatic citizenship, through his father, if his parents had legally separated prior to his 18th birthday, or if he had been under the age of 18 at the time of the enactment of the Child Citizenship Protection Act of 2000. However, his parents formally separated shortly after he turned 18, and he was 23 by the time the Act passed. See 8 U.S.C. 1431.

35. On or about July 29, 1998, Mr. Rodriguez pled guilty to Unlawful Driving or Taking of a Vehicle under section 10851(A) of the California Vehicle Code (CVC). For this crime he was sentenced to two years. Five years later, on or about October 21, 2003, he pled no contest and was convicted of Possession of a Controlled Substance under California Health and Safety Code section 11377(A), for which he received formal probation of 5 years under the conditions of California Prop 36. He was transferred to DHS custody after his arrest, on April 10, 2004. He was detained for over three years after that transfer, until the government released him shortly after the filing of the class certification motion in this case.

36. The government charged Mr. Rodriguez with being removable based on his drug offense on April 15, 2004. At his removal hearing, Mr. Rodriguez contested that his conviction rendered him removable, and argued in the alternative that he was eligible for relief from removal.[6]

37. The government received a continuance to alter the charging documents in his case, after which it charged Mr. Rodriguez with being deportable on an additional ground based on his 1998 conviction for theft. Subsequently, on July 21, 2004, an immigration judge ordered him removed, holding that both his drug

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[6] An ICE officer initially deemed him eligible for release on bond, and set the bond at $15,000. However, Mr. Rodriguez was unable to afford the bond in that amount, and an immigration judge denied his request to lower the bond amount. Shortly after the BIA decided his case in 2004, the government revoked that bond order and ordered him detained without bond under the mandatory detention provision codified at 8 U.S.C. 1226(c).

offense and his theft offense rendered him removable. The Judge held that the drug offense was a controlled substance offense triggering removal and that the theft conviction was an aggravated felony, triggering mandatory removal.[7] The immigration judge ordered him deported to Mexico. Mr. Rodriguez appealed that decision to the BIA.

38. On December 21, 2004, the Board reversed the Judge's decision that the drug possession conviction rendered Mr. Rodriguez removable, but upheld the decision that his theft conviction was an aggravated felony.

39. On December 28, 2004, Mr. Rodriguez timely petitioned for review of the Board's decision to the Ninth Circuit, arguing inter alia that his crime was not an aggravated felony as defined by the Immigration and Nationality Act. Mr. Rodriugez then sought a stay of removal, which the government opposed. Thereafter, the Ninth Circuit granted his request for a stay of removal, and therefore necessarily found that

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[7] Although not charged in the immigration charging document, the government also presented evidence from court records that, on or about October 24, 2003, a man using the name Alejandro Rodriguez (who also used another name as an alias) pled guilty to California Health and Safety Code section 11550(a), Under the Influence of a Controlled Substance, and sentenced to 120 days in jail, which he served during the same time that Mr. Rodriguez was released and reporting to the court for his conviction of October 21, 2003. The date of conviction makes it highly unlikely that Mr. Rodriguez was in fact convicted of this offense. Nonetheless, the IJ ruled that this conviction constituted a second drug offense, rendering Petitioner removable on the basis of the drug convictions.

his case presents substantial legal claims. See Maharaj v. Ashcroft, 295 F.3d 963, 966 (9th Cir. 2002).

40. While Mr. Rodriguez's case was pending at the Ninth Circuit, that court decided another case holding that Mr. Rodriguez's theft conviction was not an aggravated felony. The government then moved to hold his case in abeyance while it sought en banc review of that decision. The Ninth Circuit granted the motion, even though he had already been detained for 15 months at that time. After en banc review failed, the government sought Supreme Court review in the other case, and again requested that Mr. Rodriguez's case be held. After the Supreme Court granted cert, his case was held still further. In the end, his case was held in abeyance for over two years, but none of the decisions for which it was held established that he was subject to mandatory removal, as the immigration courts had found.

41. Eventually, the government largely conceded that Mr. Rodriguez's convictions did not subject him to mandatory removal, and it agreed to remand his case to the immigration courts on this basis. His case is now back before an immigration judge, who will consider his (exceedingly strong) application for cancellation of removal in January 2011.

42. During the three years of Mr. Rodriguez's detention, the government never held a hearing as to whether his prolonged detention is justified. In fact, the only process Mr. Rodriguez received with respect to his detention was what the government calls "File Custody Reviews." The first of these occurred on March 10, 2005, when an ICE agent presumably read through his file and issued a "Decision to Continue

Detention." No ICE official interviewed Mr. Rodriguez, let alone held a hearing, prior to making this decision. Instead, ICE merely gave him a questionnaire to fill out, asking for information regarding family members, employment experience, and any outstanding probation requirements. Although Mr. Rodriguez documented his work as a dental assistant and his extensive family ties, including his U.S. citizen father and sister, and his lawful permanent resident mother and brother, ICE denied his request for release, stating simply that he would remain detained until the Ninth Circuit rendered its decision. The notice offered no further explanation for the decision to continue detention, made no mention of how long Mr. Rodriguez had been detained (eleven months at that time), and offered no suggestions as to what steps he might take to effect a different outcome in any future decisions.

43. In September 2005, ICE conducted another file custody review, which it apparently denied for similar reasons, and in March 2006 the process was repeated again. In each of these instances, the government did not even provide Mr. Rodriguez with a written decision as to why he would remain incarcerated for many more months. In March 2007 the government chose to continue Mr. Rodriguez's detention again. At the time of that last custody decision he had been detained for nearly three years, yet the decision made no mention of this fact. Instead, the decision asserted that continued detention was justified because the Ninth Circuit would decide his case soon, which was entirely incorrect.

44. Shortly after the original class complaint in this case was filed, the government released Mr. Rodriguez from detention, but continued to subject him to severe restraints on his liberty which remain in effect, including a requirement that he abide by a strict curfew and wear an electronic monitoring device at all times. The government has continued to require that he abide by these restrictions, and has never afforded him a hearing before an immigration judge to determine if they are necessary to ensure his appearance at his final removal hearing, where he will likely be granted cancellation of removal.

Abdirizak Aden Farah

45. Abdirizak Aden Farah is a Somali refugee who has been detained for over eight months at the Mira Loma facility without any kind of hearing to determine whether his detention is justified.

46. Mr. Farah was born on May 5, 1987 in Kismayo, Somalia. His family lived in Mogadishu for the early part of his childhood. Thousands of refugees have fled Somalia since the country's civil war erupted approximately twenty years ago. Today, there is no functioning government in most of Somalia, and the country exists in a state of constant civil war and virtual anarchy. The United Nations High Commission for Refugees issued guidelines in May 2010 largely advising against the return of anyone from central or southern Somalia, including even asylum seekers whose claims had been rejected. With respect to the capital of Mogadishu (where Mr. Farah lived prior to suffering persecution), a Human Rights Watch researcher has stated that "Mogadishu is one of the world's most dangerous places . . . Returning peo-

ple there is not just risky; it's a potential death sentence."

47. Mr. Farah first faced persecution in Somalia as a child, when his family was forced to flee Mogadishu because they were members of the minority Marehan clan who faced danger from members of the Hawiye, a powerful majority clan in Somalia. Eventually, the family was able to settle in Kismayo, a city in Somalia where the Hawiye were not powerful. Several years later, his father was shot and killed by members of a Hawiye sub-clan when he returned briefly to Mogadishu to try to sell the family home.

48. Mr. Farah fled Somalia in April 2009 in order to escape the al-Shabaab, a militant Islamic organization that is trying to take over Somalia. Al-Shabaab militants shot and killed his brother Mohamed because he worked as a driver for the Somali Transitional Federal Government (TFG) in the summer of 2007. These same militants nearly killed Mr. Farah in the same attack by slashing his wrist with a knife. Afterward, al-Shabaab members repeatedly accused him of working for the TFG and finally threatened to kill him if he did not join them.

49. After the last of these threats, Mr. Farah's uncle sent money for him to flee. With the assistance of several people, he arrived by a circuitous route at the southern border of the United States, where he presented himself at the border and requested asylum on or about December 31, 2009. An asylum officer found his claim credible, and referred him for a full asylum hearing before an immigration judge.

50. Mr. Farah has had several hearings in his immigration case, the first of which took place in March 2010. At several of these, the immigration judge continued his hearing because he did not have a lawyer, while others were cancelled because the judge or the translator were not present. His next hearing is scheduled for late October 2010.

51. Mr. Farah has applied for release on parole under 8 C.F.R. 212(d)(5)(A). Under these procedures, the decision whether or not to release him is made by a single officer, with no appeal process, and without providing a hearing of any kind. An ICE officer denied him release without meaningful explanation.

52. Mr. Farah's wife and baby daughter remain in Somalia. He has been unable to establish any contact with them because of his detention.

Yussuf Abdikadir

53. Yussuf Abdikadir is also a Somalian refugee. He has been detained by immigration authorities since early March 2010, and also has not received a detention hearing of any kind.

54. Mr. Abdikadir was born on October 5, 1980.[8] He lived with his family—including his parents and five siblings—as a child in Mogadishu. He is also a member of a minority clan in Somalia.

55. In 1991, as the Somali political structure disintegrated, a militia associated with a dominant clan, the Hawiye, attacked Mr. Abdikadir's family. They killed

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[8] Yussuf is his given name, while Abdikadir is his father's given name.

his two older brothers, his father, and his grandmother. They also severely mistreated other members of the family, and raped his mother.

56. Mr. Abdikadir and his surviving family members then fled to Kenya, where they lived in various refugee camps for most of the next two decades. He married Shukri Hussein, also a Somalian refugee, while in the camps, and the couple had three children. (Ms. Hussein also has a son from a prior relationship, who is now Mr. Abdikadir's step-son).

57. Life in the refugee camps was very hard for Mr. Abdikadir and his family. Kenya granted them no permanent status, and as a result they were forced to live in the camps and denied the right to work. At the same time, the Kenyan government and international agencies failed to provide sufficient food for the refugees. He and his family would have to wait for hours during the heat of the day to obtain their small food rations, and often were mistreated by the Kenyan authorities while waiting. Mr. Abdikadir occasionally worked illegally in order to supplement his family's meager provisions, but Kenyan authorities arrested and punished him for doing so. The Kenyan authorities also did little if anything to stop the bandits who would raid the camps at night, raping camp residents and pillaging their belongings.

58. After life in the camps became too difficult, Mr. Abdikadir's mother managed to sell some land the family owned in Somalia, and used these proceeds to procure funds to allow her son to escape. Unable to return to Somalia or survive further life in the Kenyan refugee camps, Mr. Abdikadir fled. He traveled a circuitous route in search of a country with refugee

protections, and ultimately arrived at the southern border of the United States seeking asylum.

59. At the border crossing from Tijuana he presented a birth certificate and applied for asylum, entering ICE detention in March 2010. He was sent to Mira Loma shortly afterward, and passed his credible fear interview several weeks later, in approximately April 2010.

60. Mr. Abdikadir has been before an immigration judge several times since then, but has yet to even submit an application for asylum, because he was unable to find a lawyer to represent him and speaks virtually no English.

61. Mr. Abdikadir has also applied for release on parole under 8 C.F.R. 212(d)(5)(A). As with Mr. Farah, the decision whether or not to release Mr. Abdikadir is made by a single officer, with no appeal process, and without a hearing of any kind. Mr. Abdikadir requested release from this officer, and in doing so provided his birth certificate as well as a sworn affidavit from a friend of his who lives in San Diego and is willing to house and assist him. Nonetheless, his parole request was denied. The sole explanation provided was a check mark in a box next to a paragraph which states "You have not established to ICE's satisfaction that you will appear as required for immigration hearings, enforcement appointments, or other matters, if you are paroled from detention." Other than requesting a redetermination based on changed circumstances, Mr. Abdikadir has no recourse to any further process for appeal.

62. Mr. Abdikadir has suffered during his time in detention, not only because of the traumatic effects of detention in general on those who have suffered past persecution, but also because of his medical problems. Mr. Abdikadir has some kind of problem concerning his eyes—perhaps tied to light sensitivity—that causes them to be constantly red and irritated. Although he has sought medical attention for this problem at the Mira Loma Detention Center, the clinic there has not provided him with any medication that has addressed the problem.

63. Mr. Abdikadir has been unable to communicate with his family while in detention. He awaits the opportunity to win his release and his status, so that he can begin to recover from the years of suffering he has faced, and also so that he can speak with and hopefully some day re-unite with his wife and children. Given that he has not even submitted an asylum application yet, he will remain incarcerated without a hearing for months more absent this Court's intervention.

Abel Perez Ruelas

64. Abel Perez Ruelas is a citizen of Mexico. He has been in immigration detention at Mira Loma Detention Center for 17 months, since April 8, 2009.

65. Mr. Perez Ruelas was born on January 25, 1967 in Jalisco, Mexico. In 1996, he met Maria del Rosario, with whom he had a daughter, Azirit Lessandra, one year later.

66. He was admitted to the United States in 2002 on a visitors' visa, two years after he broke up and lost contact with with Ms. del Rosario.

67. In approximately 2007, about five years after Mr. Perez-Ruelas came to live in the United States, he received a call from his mother, who told him that Ms. del Rosario had died in childbirth in Mexico, and that his daughter had been sent to live with her mother's parents. Since then, Mr. Perez Ruelas has been living with the hope that one day he may bring his daughter to the United States to live with him.

68. On December 22, 2008, Mr. Perez Ruelas married Maria Navichoque Perez, a U.S. citizen. She is a nurse at the Los Angeles Jewish Home, a non-profit senior living facility in Reseda, California. The couple filed to adjust his status based on their marriage in approximately February 2009.

69. After his marriage, Mr. Perez Ruelas became the stepfather of Maria Perez's four children, all of whom are U.S. citizens by birth. The two youngest children, Hector and Emily, live with Mr. Perez Ruelas and his wife in their home in Reseda, California.

70. Mr. Perez Ruelas has lived and worked in the United States for almost eight years. He works in construction, primarily with cement and tiles. Prior to his detention, he regularly attended church with his wife in Pacoima and Reseda.

71. Mr. Perez Ruelas has had three prior convictions for driving under the influence of alcohol, none for which he spent more than two months in jail. Mr. Perez Ruelas served three months of probation for his first offense in 1994; he served 10 days in jail for his second, a decade later in 2004; and he served 60 days in jail for his third, which occurred four years later. Pursuant to his sentence for the last conviction, Mr.

Perez Ruelas has diligently attended Alcoholics Anonymous for over a year, and has continued attending AA meetings even while in immigration detention.

72. On or about April 8, 2009, Mr. Perez Ruelas was released from jail for his last offense. Immigration and Customs Enforcement officials immediately took him into immigration custody, notwithstanding his pending application to adjust his status based on his marriage. At the time, Mr. Perez-Ruelas was in the process of becoming a lawful permanent resident of the United States.

73. Mr. Perez Ruelas was given a bond hearing on April 21, 2009, pursuant to 8 U.S.C. 1226(a), at which he bore the burden to prove that he was not a danger or flight risk. Upon information and belief, the immigration judge knew that Mr. Perez Ruelas was married to a U.S. citizen and that he had a pending adjustinent application, but nonetheless the judge denied him release on bail. He told Mr. Perez Ruelas that his prior DUI convictions made him a danger to society, even though his sentence had long since expired.

74. With the assistance of his attorney, Mr. Perez Ruelas applied for a bond reduction in February 2010. At that hearing, the immigration judge set a bond of $5,000, an amount too high for Mr. Perez Ruelas's family to pay.

75. Because he could not pay, Mr. Perez Ruelas remained in immigration detention—where he has been for the past 16 months awaiting adjudication of his case. His last hearing was over four months ago, on April 15, 2010.

76. On July 30, 2010, Mr. Perez Ruelas and his wife received notice that their application to adjust his status had been approved, with a priority date of March 22, 2009. Although he is entitled to adjust status immediately and will no doubt ultimately prevail in his immigration case, he nonetheless remains detained for no apparent reason, merely because under the stringent standard applied at his bond hearing he cannot pay the bond that the immigration judge set in his case.

Jose Farias Cornejo

77. Jose Farias Cornejo is a citizen of Mexico and a lawful permanent resident of the United States. He has been in immigration detention at Mira Loma Detention Center for over eleven months, since September 14, 2009.

78. Mr. Farias Cornejo was born on August 14, 1984 in Michoacan, Mexico. He was brought to the United States prior to his first birthday by his parents, who were migrant farm workers. He has never left this country, and speaks fluent English.

79. Mr. Farias Cornejo has four siblings. All four are U.S. citizens. Mr. Farias Cornejo's mother is also a lawful permanent resident of the United States.

80. Mr. Farias Cornejo spent his childhood years in Washington and his adolescence in California because his parents were migrant farm workers. He attended elementary school in San Diego for a few years before moving to Montclair, California to attend middle school and high school. He took special education classes at Montclair High School because of his diagnosed learning disability.

81. After graduating from high school, Mr. Farias Cornejo worked at various jobs near his hometown in California, including in construction—manufacturing jacuzzis and landscaping.

82. Mr. Farias Cornejo has had several prior convictions. In 2007, he was convicted of possession of methamphetamine and was given the opportunity to receive substance abuse treatment as an alternative to incarceration under California Proposition 36. Mr. Farias Cornejo diligently completed his drug treatment classes, but because he could not afford to pay the mandatory fine, he was sentenced to 180 days in jail.

83. Upon information and belief, in 2009 Mr. Farias Cornejo was convicted of a misdemeanor California theft offense, for which he spent 14 days in jail. In that same year, he was convicted of being under the influence of a controlled substance, for which he spent 60 days in jail.

84. Shortly after serving his last sentence, in September 2009, federal immigration officials initiated removal proceedings against him and placed him in immigration detention, citing their authority to mandatorily detain any individual with a prior controlled substance offense under 8 U.S.C. 1226(c).

85. Although the government contends that Mr. Farias Cornejo is subject to "mandatory detention" without a bond hearing under that provision, it has acknowledged that he is eligible for relief from removal in the form of cancellation of removal under 8 U.S.C. 1229b, because he has not been convicted of an "aggravated felony."

86. Mr. Farias Cornejo was given a cancellation application on October of 2009, but struggled to find an attorney to assist him in completing it. After five months in detention, he finally found an attorney, but that attorney did not file his application. Eventually Mr. Farias Cornejo found a different attorney to represent him, in June of this year. Through his new attorney Mr. Farias Cornejo finally filed his cancellation application, nearly ten months after he was placed into immigration detention.

87. Upon information and belief, at his cancellation hearing on August 17, 2010, the government stated that it had no objection to his application. However, the immigration judge told Mr. Farias Cornejo that he had an outstanding warrant, and therefore refused to adjudicate the application. Instead, the judge set his next court hearing for November 15, 2010, apparently on the assumption that his warrant would be resolved prior to that time.

88. Although Mr. Farias Cornejo poses no flight risk, is not a danger to the community, and is eligible for relief from removal, he remains subject to continued detention. He has never had a hearing to determine whether his detention remains justified even though he has now been incarcerated for nearly a year.

* * * * *

CLASS-WIDE ALLEGATIONS

103. Petitioners are amongst approximately at least 350 detainees, if not more, in the Central District on any given day whom the government has incarcerated for more than six months without proving at an adequate hearing that their prolonged detention is justi-

fied.[10] Indeed, it is the government's policy or practice to detain non-citizens under the general immigration detention statutes for prolonged periods of time pending completion of their removal proceedings without providing them with such hearings.

104. In response, Petitioners bring this action on behalf of themselves and all other persons similarly-situated, pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2), or in the alternative, as a representative action pursuant to a procedure analogous to that provided in Rules 23(a) and 23(b)(2). *See Rodriguez v. Hayes*, 578 F.3d 1032, 1047 (9th Cir. 2009) (allowing this case to proceed as a class action habeas petition).

105. Petitioners represent a class of all people within the Central District of California who 1) are or will be detained for longer than six months pursuant to the general immigration detention statutes pending completion of removal proceedings, including judicial review, 2) are not detained pursuant to one of the national security detention statutes at 8 U.S.C. 1226a and

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[10] This Court ordered the government to produce a "snapshot" list of all class members on a particulate date, which the government produced for the date of April 21, 2010. As of that day, there were 352 class members—people incarcerated in ICE custody in the Central District who had been in ICE custody for at least 180 days, and whose cases remained pending either before the immigration courts or before the federal courts with a stay of removal in effect. The list also included a number of people who were not class members because they were not incarcerated in detention centers at all, but rather in juvenile facilities, and also two people who were not class members because they were had final removal orders with no stay of removal in effect.

8 U.S.C. 1531-37 and 3) have not been afforded a hearing to determine whether their prolonged detention is justified.

106. The class includes people who were present in an ICE detention facility in the Central District on or after the date on which the original complaint was filed as long as they had been detained by ICE for more than six months at that time, even if they are no longer in the Central District; it therefore includes people subject to the mass transfer of detainees from the San Pedro Detention Facility in October 2007, as long as those people remain in an ICE detention facility somewhere and their cases remain pending.

107. The class excludes people who have a final order of removal and no stay of that removal order, such that the government has legal authority to remove them.

108. The class excludes juveniles who are held under the care of the Office of Refugee Resettlement. It also excludes people imprisoned pursuant to a criminal sentence, including individuals who complete removal proceedings and any judicial review while serving such sentences.

109. Pursuant to this Court's directive that the parties propose sub-classes, Petitioners propose that the Court also certify four sub-classes in this action, corresponding to each of the general detention statutes. Petitioners propose to represent a sub-class of class members detained under 8 U.S.C. 1225(b) represented by Mr. Farah and Mr. Abdikadir, a sub-class of class members detained under 8 U.S.C. 1226(a) represented by Mr. Rodriguez and Mr. Perez Ruelas, a sub-class of class members detained under 8 U.S.C. 1226(c) repre-

sented by Mr. Farias Cornejo, and a sub-class of class members detained under 8 U.S.C. 1231(a) represented by Mr. Ayala.

110. For each putative sub-class and each detention statute, Petitioners' counsel estimates that there will be far more than forty other sub-class members in this District who, like each of the Petitioners, have been detained for more than six months, are detained under that particular general detention statute, and have not been afforded a constitutionally-adequate hearing to determine whether their prolonged detention is justified. Indeed, there may well be more than forty members of each sub-class detained in the Central District on any given single day.

111. The proposed class and sub-classes meet the requirements of Fed. R. Civ. Pro. 23(a)(2). For the class as a whole, there are several common questions of law and fact in the action. These include 1) whether the government has a policy or general practice of detaining non-citizens in removal proceedings for longer than six months under the general immigration detention statutes without providing an adequate hearing to determine whether such prolonged detention is justified, 2) whether any general immigration detention statute authorizes this detention policy or practice, and 3) whether this detention policy or practice violates the Due Process Clause. *Rodriguez*, 578 F.3d at 1048-49 (finding common questions).

112. There are additional common questions of law that pertain to each subclass. These include: for Subclass 1, whether 8 U.S.C. 1225(b) authorizes the policy or general practice of detaining non-citizens in removal proceedings for longer than six months with-

out providing a hearing where the government must establish that such detention is justified; for Subclass 2, whether 8 U.S.C. § 1226(a) authorizes this detention policy or practice; for Subclass 3, whether 8 U.S.C. § 1226(c) authorizes this detention policy or practice; and for Subclass 4 whether § 1231(a) authorizes this detention policy or practice.

113. The claims of the named representative Petitioners are typical of the claims of each proposed subclass and of the class as a whole. Like all of the proposed class members, the named Petitioners will have been detained, pursuant to the government's policy and practice, for at least six months under the relevant general immigration detention statutes, without having been afforded an adequate hearing where the government has shown that their prolonged detention is justified. *Rodriguez*, 578 F.3d at 1048-50.

114. The named Petitioners will fairly and adequately represent the interests of all members of the proposed class and sub-classes because they seek relief identical to the relief sought by all class members, and because they have no interests adverse to other class members. Moreover, the named Petitioners are represented by pro bono counsel from the ACLU of Southern California, the ACLU Immigrants' Rights Project, the Stanford Law School Immigrants' Rights Clinic, and the law firm of Sidley Austin LLP. These organizations and the attorneys working for them have extensive experience litigating on behalf of detained immigrants and broad experience litigating class actions. *Rodriguez*, 578 F.3d at 1050.

115. Respondents have acted on grounds generally applicable to the class and to each subclass through

their policy and practice of detaining non-citizens in removal proceedings for longer than six months under each of the general immigration detention statutes without providing an adequate hearing where the government has shown that their prolonged detention is justified, making class-wide declaratory and injunctive relief appropriate.

* * * * *

FIRST CAUSE OF ACTION

Violation of Immigration and Nationality Act and Regulations

124. Petitioners reallege and incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

125. Respondents' continued detention of Petitioners and other putative class members under the general immigration detention statutes violates the Immigration and Nationality Act, insofar as the statutes under which they are detained do not authorize detention for a prolonged period of time absent an adequate hearing at which the government shows that their detention remains justified.

SECOND CAUSE OF ACTION

Violation of Fifth Amendment Due Process (Right to a Constitutionally Adequate Custody Hearing)

126. Petitioners reallege and incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

127. Respondents' continued detention of Petitioners and other class members without an adequate hearing

where the government shows that their prolonged detention remains justified violates the right to be free of prolonged non-criminal detention without adequate justification and sufficient procedural safeguards, as guaranteed by the Due Process Clause of the Fifth Amendment to the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully request that the Court grant the following relief:

a. Assume jurisdiction of this matter;

b. Certify a class and sub-classes as appropriate under Fed. R. Civ. Pro. 23 (or other analogous procedures) consisting of all people within the Central District of California who 1) are or will be detained for longer than six months pursuant to the general immigration detention statutes pending completion of removal proceedings, including judicial review, 2) are not detained pursuant to one of the national security detention statutes at 8 U.S.C. 1226a and 8 U.S.C. 1531-37 and 3) have not been afforded a hearing to determine whether their prolonged detention is justified;

c. Appoint Petitioners Rodriguez and Perez Ruelas, as representatives of a sub-class of class members detained under 8 U.S.C. 1226(a); Petitioners Farah and Abdikadir as representatives of a sub-class of class members detained under 8 U.S.C. 1225(b); Petitioner Farias Cornejo as the representative of a sub-class of class members detained under 8 U.S.C. 1226(c); and Petitioner Ayala as the representative of a sub-class of class members detained under 8 U.S.C. 1231.

d. Appoint Petitioners' Counsel as Counsel for the Class and each subclass;

e. Order Respondents to provide, after giving notice, individual hearings before an immigration judge for Petitioners and each member of the class, at which Respondents will bear the burden to prove by clear and convincing evidence that no reasonable conditions will ensure the detainee's presence in the event of removal and protect the community from serious danger, despite the prolonged length of detention at issue;

f. Declare that Respondents' failure to provide Petitioners and the members of the class with adequate hearings violates the Immigration and Nationality Act and the Due Process Clause of the Fifth Amendment;

g. Enjoin Respondents from failing to provide Petitioners and each member of the Class, upon notice, with adequate hearings before an immigration judge (as specified above in subsection (e) of this Prayer);

h. Grant Petitioners reasonable attorneys' fees, costs, and other disbursements pursuant to the Equal Access to Justice Act, 28 U.S.C. 2412;

i. Grant such other relief as the Court deems just and equitable.

Respectfully submitted,

ACLU OF SOUTHERN CALIFORNIA

By /s/ AHILAN T. ARULANANTHAM
AHILAN T. ARULANANTHAM
Counsel for Petitioners

Dated: Oct. 20, 2010

DEPARTMENT OF HOMELAND SECURITY

NOTICE OF CUSTODY DETERMINATION

Alien's Name: _____ A-File Number: _____

Date: _____

Event ID _____ Subject ID _____

Pursuant to the authority contained in section 236 of the Immigration and Nationality Act and part 236 of title 8, Code of Federal Regulations, I have determined that, pending a final administrative determination in your case, you will be:

☐ Detained by the Department of Homeland Security

☐ Released (check all that apply):

☐ Under bond in the amount of $ _____

☐ On your own recognizance

☐ Under other conditions [Additional document(s) will be provided]

_____ _____

Name and Signature of Authorized Officer Date and Time of Custody Determination

_____

Office Location/Address

You may request a review of this custody determination by an immigration judge

☐ I acknowledge receipt of this notification and

☐ I **do** request an immigration judge review of this custody determination

☐ I **do not** request an immigration judge review of this custody determination

_____ _____

Signature of Alien Date

The contents of this notice were read to _____ in the _____ language

(Name of Alien) (Name of Language)

_____ _____

Name and Signature of Officer Name or Number of Interpreter (if applicable)

_____

Title

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT
Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture

DISTRIBUTION:	**ICE**
DIRECTIVE NO:	**11002.1**
ISSUE DATE:	**December 8, 2009**
EFFECTIVE DATE:	**January 4, 2010**
SUPERSEDES:	**See section 3.**
FEA NUMBER:	**601-05**

1. **PURPOSE.** The purpose of this ICE policy directive is to ensure transparent, consistent, and considered ICE parole determinations for arriving aliens seeking asylum in the United States. This directive provides guidance to Detention and Removal Operations (DRO) Field Office personnel for exercising their discretion to consider the parole of arriving aliens processed under the expedited removal provisions of section 235 of the Immigration and Nationality Act (INA) who have been found to have a "credible fear" of persecution or torture by U.S. Citizenship and Immigration Services (USCIS) or an immigration judge of the Executive Office for Immigration Review. This directive establishes a quality assurance process that includes record-keeping requirements to ensure accountability and compliance with the procedures set forth herein.

1.1. This directive does not apply to aliens in DRO custody under INA § 236. This directive applies only to arriving aliens who have been

found by USCIS or an immigration judge to have a credible fear of persecution or torture.

2. **AUTHORITIES/REFERENCES.**

2.1. INA §§ 208, 212(d)(5), 235(b), and 241(b)(3); 8 U.S.C. §§ 1158, 1182(d)(5), 1225(b), and 1231(b)(3); 8 C.F.R. §§ 1.1(q), 208.30(e)-(f), 212.5 and 235.3.

2.2. Department of Homeland Security Delegation Number 7030.2, "Delegation of Authority to the Assistant Secretary for the Bureau of Immigration and Custom Enforcement" (Nov. 13, 2004).

2.3. ICE Delegations of Authority to the Directors, Detention and Removal and Investigations and to Field Office Directors, Special Agents in Charge and Certain Other Officers of the Bureau of Immigration and Customs Enforcement, No. 0001 (June 6, 2003).

3. **SUPERSEDED POLICIES AND GUIDANCE.** The following ICE directive is hereby superseded:

3.1. ICE Policy Directive No. 7-1.0, "Parole of Arriving Aliens Found to Have a 'Credible Fear' of Persecution or Torture" (Nov. 6, 2007).

4. **BACKGROUND.**

4.1. Arriving aliens processed under the expedited removal provisions of INA §235(b) may pursue asylum and related forms of protection from removal if they successfully demonstrate to USCIS or an immigration judge a credible fear of persecution or torture.

4.2. Arriving aliens who establish a credible fear of persecution or torture are to be detained for further consideration of the application for asylum. INA § 235(b)(1)(B)(ii). Such aliens, however, may be paroled on a case-by-case basis for "urgent humanitarian reasons" or "significant public benefit," provided the aliens present neither a security risk nor a risk of absconding. 8 C.F.R. § 212.5(b); *see also* 8 C.F.R. § 235.3(c) (providing that aliens referred for INA § 240 removal proceedings, including those who have a credible fear of persecution or torture, may be paroled under § 212.5(b) standards).

4.3. The applicable regulations describe five categories of aliens who may meet the parole standards based on a case-by-case determination, provided they do not present a flight risk or security risk: (1) aliens who have serious medical conditions, where continued detention would not be appropriate; (2) women who have been medically certified as pregnant; (3) certain juveniles; (4) aliens who will be witnesses in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies in the United States; and (5) aliens whose continued detention is not in the public interest. *See* 8 C.F.R. § 212.5(b). *But compare* 8 C.F.R. § 235.3(b)(4)(ii) (stating that arriving aliens who have not been determined to have a credible fear will not be paroled unless parole is necessary in light of a "medical emergency or is necessary for a legitimate law enforcement objective").

4.4. While the first four of these categories are largely self-explanatory, the term "public interest" is open to considerable interpretation. This directive explains how the term is to be interpreted by DRO when it decides whether to parole arriving aliens determined to have a credible fear. The directive also mandates uniform record-keeping and review requirements for such decisions. Parole remains an inherently discretionary determination entrusted to the agency; this directive serves to guide the exercise of that discretion.

5. **DEFINITIONS:**

5.1. **Arriving Alien.** For purposes of this directive, "arriving alien" has the same definition as provided for in 8 C.F.R. § 1.1(q) and 1001.1(q).

5.2. **Credible Fear.** For purposes of this directive, with respect to an alien processed under the INA § 235(b) "expedited removal" provisions, "credible fear" means a finding by USCIS or an immigration judge that, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the interviewing USCIS officer or immigration judge, there is a significant possibility that alien could establish eligibility for asylum under INA § 208, withholding of removal under INA § 241(b)(3), or protection from removal under the Convention Against Torture.

5.3. **Parole.** For purposes of this directive, "parole" is an administrative measure used by ICE to

temporarily authorize the release from immigration detention of an inadmissible arriving alien found to have a credible fear of persecution or torture, without lawfully admitting the alien. Parole does not constitute a lawful admission or determination of admissibility, *see* INA §§ 212(d)(5)(A), 101(a)(13)(B), and reasonable conditions may be imposed on the parole, *see* 8 C.F.R. § 212.5(d). By statute, parole may be used, in the discretion of ICE and under such conditions as ICE may prescribe, only for urgent humanitarian reasons or for significant public benefit. As interpreted by regulation, "urgent humanitarian reasons" and "significant public benefit" include the five categories set forth in 8 C.F.R. § 212.5(b) and listed in paragraph 4.3 of this directive, including the general category of "aliens whose continued detention is not in the public interest."

6. **POLICY.**

6.1. As soon as practicable following a credible fear determination by USCIS for an arriving alien detained by DRO, DRO shall provide the alien with the attached *Parole Advisal and Scheduling Notification*. This form informs the alien that he or she will be interviewed for potential parole from DRO custody and notifies the alien of the date of the scheduled interview and the deadline for submitting any documentary material supporting his or her eligibility for parole. The contents of the notification shall be explained to such aliens in a language they under-

stand. In determining whether detained arriving aliens found to have a credible fear should be paroled from custody, DRO shall proceed in accordance with the terms of this directive.

6.2. Each alien's eligibility for parole should be considered and analyzed on its own merits and based on the facts of the individual alien's case. However, when an arriving alien found to have a credible fear establishes to the satisfaction of DRO his or her identity and that he or she presents neither a flight risk nor danger to the community, DRO should, absent additional factors (as described in paragraph 8.3 of this directive), parole the alien on the basis that his or her continued detention is not in the public interest. DRO Field Offices shall uniformly document their parole decision-making processes using the attached *Record of Determination/ Parole Determination Worksheet.*

6.3. Consistent with the terms of this directive, DRO shall maintain national and local statistics on parole determinations and have a quality assurance process in place to monitor parole decision-making, as provided for in sections 7 and 8 of this directive.

6.4. In conducting parole determinations for arriving aliens in custody after they are found to have a credible fear of persecution or torture, DRO shall follow the procedures set forth in section 8 of this directive.

6.5. DRO shall provide every alien subject to this directive with written notification of the parole decision, including a brief explanation of the reasons for any decision to deny parole. When DRO denies parole under this directive, it should also advise the alien that he or she may request redetermination of this decision based upon changed circumstances or additional evidence relevant to the alien's identity, security risk, or risk of absconding. DRO shall ensure reasonable access to translation or interpreter services if notification is provided to the alien in a language other than his or her native language and the alien cannot communicate effectively in that language.

6.6. Written notifications of parole decisions shall be provided to aliens subject to this directive and, if represented, their representative within seven days of the date an alien is initially interviewed for parole or the date the alien requests a parole redetermination, absent reasonable justification for delay in providing such notification.

6.7. A decision to grant or deny parole shall be prepared by a DRO officer assigned such duties within his or her respective DRO Field Office. The decision shall pass through at least one level of supervisory review, and concurrence must be finally approved by the Field Officer Director (FOD), Deputy FOD (DFOD), or Assistant FOD (AFOD), where authorized by the FOD.

7. RESPONSIBILITIES.

7.1. The **DRO Director** is responsible for the overall management of the parole decision-making process for arriving aliens in DRO custody following determinations that they have a credible fear of persecution or torture.

7.2. The **DRO Assistant Director for Operations** is responsible for:

1) Ensuring considered, consistent DRO parole decision-making and recordkeeping nationwide in cases of arriving aliens found to have a credible fear;

2) Overseeing monthly tracking of parole statistics by all DRO Field Offices for such cases; and

3) Overseeing an effective national quality assurance program that monitors the Field Offices to ensure compliance with this directive.

7.3. **DRO Field Office Directors** are responsible for:

1) Implementing this policy and quality assurance processes;

2) Maintaining a log of parole adjudications for credible fear cases within their respective geographic areas of responsibility, including copies of the *Record of Determination/Parole Determination Worksheet*;

3) Providing monthly statistical reports on parole decisions for arriving aliens found to have a credible fear;

4) Making the final decision to grant or deny parole for arriving aliens found to have a credible fear within their respective areas of responsibility or, alternatively, delegating such responsibility to their DFODs or AFODs (in which case, FODs nevertheless retain overall responsibility for their office's compliance with this directive regardless of delegating signatory responsibility to DFODs or AFODs); and

5) Ensuring that DRO field personnel within their respective areas of responsibility who will be assigned to make parole determinations are familiar with this directive and corresponding legal authorities.

7.4. **DRO Deputy Field Office Directors** are responsible for reviewing, and forwarding for their respective FODs' approval, parole decisions prepared by their subordinates in the cases of arriving aliens found to have a credible fear of persecution or torture. Alternatively, DFODs delegated responsibility under paragraph 7.3 of this directive are responsible for discharging final decision-making authority over parole determinations in such cases within their respective areas of responsibility.

7.5. **Assistant Field Office Directors** are responsible for reviewing, and forwarding for their respective DFODs' or FODs' approval, parole decisions prepared by their subordinates in the cases or arriving aliens found to have a credible fear of persecution or torture. Alternatively,

AFODs delegated responsibility under paragraph 7.3 of this directive are responsible for discharging final decision-making authority over parole determinations in such cases within their respective areas of responsibility.

7.6. As applicable, **DRO field personnel** so assigned by their local chains-of-command are responsible for providing detained arriving aliens found to have a credible fear with the attached *Parole Advisal and Scheduling Notification* and for fully and accurately completing the attached *Record of Determination/Parole Determination Worksheet* in accordance with this directive and corresponding legal authorities.

8. **PROCEDURES.**

8.1. As soon as practicable following a finding that an arriving alien has a credible fear, the DRO Field Office with custody of the alien shall provide the attached *Parole Advisal and Scheduling Notification* to the alien and explain the contents of the notification to the alien in a language he or she understands, through an interpreter if necessary. The Field Office will complete the relevant portions of the notification, indicating the time when the alien will receive an initial interview on his or her eligibility for parole and the date by which any documentary evidence the alien wishes considered should be provided, as well as instructions for how any such information should be provided.

8.2. Unless an additional reasonable period of time is necessary (e.g., due to operational exigencies

or an alien's illness or request for additional time to obtain documentation), no later than seven days following a finding that an arriving alien has a credible fear, a DRO officer familiar with the requirements of this directive and corresponding legal authorities must conduct an interview with the alien to assess his or her eligibility for parole. Within that same period, the officer must complete the *Record of Determination/Parole Determination Worksheet* and submit it for supervisory review. If the officer concludes that parole should be denied, the officer should draft a letter to this effect for the FOD's, DFOD's, or AFOD's signature to be provided to the alien or the alien's representative and forward this letter for supervisory review along with the completed *Record of Determination/Parole Determination Worksheet.* The letter must include a brief explanation of the reasons for denying parole and notify the alien that he or she may request redetermination of parole based upon changed circumstances or additional evidence relevant to the alien's identity, security risk, or risk of absconding.

8.3. An alien should be paroled under this directive is DRO determines, in accordance with paragraphs (1) through (4) below, that the alien's identity is sufficiently established, the alien poses neither a flight risk nor a danger to the community, and no additional factors weigh against release of the alien.

1) *Identity.*

a) Although many individuals who arrive in the United States fleeing persecution or torture may understandably lack valid identity documentation, asylum-related fraud is of genuine concern to ICE, and DRO must be satisfied that an alien is who he or she claims to be before releasing the alien from custody.

b) When considering parole requests by an arriving alien found to have a credible fear, Field Office personnel must review all relevant documentation offered by the alien, as well as any other information available about the alien, to determine whether the alien can reasonably establish his or her identity.

c) If an alien lacks valid government-issued documents that support his or her assertion of identity, Field Office personnel should ask whether the alien can obtain government-issued documentation of identity.

d) If the alien cannot reasonably provide valid government-issued evidence of identity (including because the alien reasonably does not wish to alert that government to his or her whereabouts), the alien can provide for consideration sworn affidavits from third

parties. However, third-party affiants must include copies of valid, government issued photo-identification documents and fully establish their own identities and addresses.

e) If government-issued documentation of identity or third-party affidavits from reliable affiants are either not available or insufficient to establish the alien's identity on their own, Field Office personnel should explore whether the alien is otherwise able to establish his or her identity through credible statements such that there are no substantial reasons to doubt the alien's identity.

2) *Flight Risk.*

a) In order to be considered for release, an alien determined to have a credible fear of persecution or torture must present sufficient evidence demonstrating his or her likelihood of appearing when required.

b) Factors appropriate for consideration in determining whether an alien has made the required showing include, but are not limited to, community and family ties, employment history, manner of entry and length of residence in the United States, stability of residence in the United States, record of appearance for prior court hearings

and compliance with past reporting requirements, prior immigration and criminal history, ability to post bond, property ownership, and possible relief or protection from removal available to the alien.

c) Field Office personnel shall consider whether setting a reasonable bond and/or entering the alien in an alternative-to-detention program would provide reasonable assurances that the alien will appear at all hearings and depart from the United States when required to do so.

d) Officers should exercise their discretion to determine what reasonable assurances, individually or in combination, are warranted on a case-by-case basis to mitigate flight risk. In any event, the alien must be able to provide an address where he or she will be residing and must timely advise DRO of any change of address.

3) *Danger to the Community.*

a) In order for an alien to be considered for parole, Field Office personnel must make a determination whether an alien found to have a credible fear poses a danger to the community or to U.S. national security.

b) Information germane to the determination includes, but is not limited to,

evidence of past criminal activity in the United States or abroad, of activity contrary to U.S. national security interests, of other activity giving rise to concerns of public safety or danger to the community (including due to serious mental illness), disciplinary infractions or incident reports, and any criminal or detention history that shows that the alien has harmed or would likely harm himself or herself or others.

c) Any evidence of rehabilitation also should be weighed.

4) *Additional Factors.*

a) Because parole remains an inherently discretionary decision, in some cases there may be exceptional, overriding factors that should be considered in addition to the three factors discussed above. Such factors may include, but are not limited to, serious adverse foreign policy consequences that may result if the alien is released or overriding law enforcement interests.

b) Field Office personnel may consider such additional factors during the parole decision-making process.

8.4. Assigned DRO officers should, where appropriate, request that parole applicants provide any supplementary information that would aid the officers in reaching a decision. The *Record of*

Determination/Parole Determination Worksheet should be annotated to document the request for supplementary information and any response from the detainee.

8.5. After preparing and signing the *Record of Determination/Parole Determination Worksheet*, and in the case of a denial of parole, drafting a written response to the alien, the assigned DRO officer shall forward these materials and the parole request documentation to his or her first-line supervisor for review and concurrence.

8.6. Upon his or her concurrence, the first-line supervisor shall sign the *Record of Determination/Parole Determination Worksheet* where indicated and forward it, along with any related documentation, to the FOD (or, where applicable, the DFOD or AFOD) for final approval.

8.7. The FOD (or, where applicable, the DFOD or AFOD) shall review the parole documentation, consult with the preparing officer and supervisor as necessary, and either grant or deny parole by signing the *Record of Determination/Parole Determination Worksheet* where indicated and, in the case of a denial, signing the written response to the alien.

8.8. Following a final decision by the FOD to deny parole (or, where applicable, the DFOD or AFOD), the Field Office shall provide the written response to the alien or, if represented, to the alien's legal representative, indicating that parole was denied. If parole is granted, the Field Office shall provide the alien with a

date-stamped I-94 Form bearing the following notation: **"Paroled under 8 C.F.R. § 212.5(b). Employment authorization not to be provided on this basis."**

8.9. If an alien makes a written request for redetermination of an earlier decision denying parole, the Field Office may, in its discretion, reinterview the alien or consider the request based solely on documentary material already provided or otherwise of record.

8.10. The supporting documents and a copy of the parole decision sent to the alien (if applicable), the completed *Record of Determination/Parole Determination Worksheet*, and any other documents related to the parole adjudication should be placed in the alien's A-file in a record of proceeding format. In addition, a copy of the *Record of Determination/Parole Determination Worksheet* shall be stored and maintained under the authority of the FOD for use in preparing monthly reports.

8.11. On a monthly basis, FODs shall submit reports to the Assistant Director for Operations, or his or her designee, detailing the number of parole adjudications conducted under this directive within their respective areas of responsibility, the results of those adjudications, and the underlying basis of each Field Office decision whether to grant or deny parole. The Assistant Director for Operations, or his or her designee, in conjunction with appropriate DRO Headquarters components, will analyze this re-

porting and collect individual case information to review in more detail, as warranted. In particular, this analysis will rely on random sampling of all reported cases for in-depth review and will include particular emphasis on cases where parole was not granted because of the presence of additional factors, per paragraph 8.3(4) of this directive. Any significant or recurring deficiencies identified during this monthly analysis should be explained to the affected Field Office, which will take appropriate corrective action.

8.12. At least once every six months, the Assistant Director for Operations, or his or her designee, shall prepare a thorough and objective quality assurance report, examining the rate at which paroled aliens abscond and the Field Offices' parole decision-making, including any noteworthy trends or corrective measures undertaken based upon the monthly quality assurance analysis required by paragraph 8.11 of this directive.

9. **ATTACHMENTS.**

- *Parole Advisal and Scheduling Notification.*
- *Record of Determination/Parole Determination Worksheet.*

10. **NO PRIVATE RIGHTS CREATED.** This directive is an internal policy statement of ICE. It is not intended to, shall not be construed to, may not be relied upon to, and does not create,

any rights, privileges, or benefits, substantive or procedural, enforceable by any party against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

Approved:

/s/ JOHN MORTON
JOHN MORTON
Assistant Secretary
U.S. Immigration and Customs Enforcement

Expert Report of Professor Susan B. Long

Rodriguez v. Hayes, No. 07-3239 (C.D. Cal.)

Submitted Pursuant to Federal Rule
of Civil Procedure 26(a)(2)

INTRODUCTION

I submit this report as an expert, and at the request of Petitioners in *Rodriguez v. Hayes*. I am an Associate Professor of Managerial Statistics at the Martin J. Whitman School of Management at Syracuse University and the Co-Director of the Transactional Records Access Clearinghouse ("TRAC"). TRAC is a data research center at Syracuse University that gathers electronic data from internal government data systems, analyzes the data, and then distributes the information along with TRAC's research findings. A more detailed account of my qualifications is attached as Appendix A to this report. I was compensated at a rate of $250 per hour for my services.

Organization of Report

The report provides my research findings on the following questions I was asked to address:

1. **Detention Length.** How long has each class member been detained by Immigration and Customs Enforcement (ICE), and how have detention times varied among class members?

2. **Custody Status.** What—as of April 2012—was the custody status of each class member: No longer in ICE custody? Still in ICE custody?

3. **Court Involvement.** What court proceedings—before the Immigration Court, the Board of

Immigration Appeals, and the Ninth Circuit Court of Appeals— were decided following the individual's detention by ICE? How was this related to the detention times observed?

4. **Relief Applications.** What relief applications were filed with the Immigration Court? How was this related to detention times observed?

5. **Outcome.** What was the eventual outcome of each class member's court proceeding(s)? Did they ultimately win or lose their case? How was success or failure related to detention times observed?

6. **Comparing Outcomes in Other Removal Cases.** How did outcomes for class members compare to typical outcomes in other removal proceeding? Were they more or less successful?

7. **Aggregate Detention Days.** How does average detention time relate to aggregate detention space needed.

Research Methodology

The methodology I used was as follows. First, I compiled information for each class member covering the period from entry into ICE custody through April 2012. This information included each individual's ICE custody history, the details of any court proceedings following the individual's entry into ICE custody, the outcome of these court proceedings (or whether they were still pending), and whether deportation of the individual had occurred.

Next, for each class member I ordered these actions by calendar dates so I could examine in more detail the

chronology of events that had taken place. Using this date chronology I identified what the nature of the final court outcome had been (or whether proceedings were still pending), how long the individual had been detained (or remained in custody), and whether the individual had ultimately won their court case or had been ordered removed.

Finally, I prepared a series of tables that summarized the findings of my analysis, and prepared this report describing these findings.

Data Sources Used

The following data sources were obtained and used in my analysis:

Detention and Deportation. The official records on detention and deportation on each class member were furnished by the Immigration and Customs Enforcement (ICE). This data, obtained as part of this litigation and furnished to me, was provided as a spreadsheet data table. Each of the columns of the table contained various items of information about each class member. The data also identified which class member each piece of information was associated with by the individual's alien number and name.[1] Among

[1] I received three versions of this file. Two versions ["ICE-EDI-001" and "ICE-EDI-002"] were identical, except names had been originally redacted on the first. These indicate that the data file had been prepared on April 20, 2011 (using a data extract from ICE's "EID" database prepared on April 18, 2011). The remaining file ["ICE-EDI-009"] was prepared a year later, according to source information provided with the file, and contained additional updated information from a data extract from ICE's "EID" database prepared on April 28, 2012.

the fields of information recorded on each class member were the following items:

- date individual entered ICE custody
- date(s) individual had been released or left ICE custody
- for those individuals who had been deported, the departure date when he or she had left the United States

The data indicated that some individuals remained in ICE custody. Also, some individuals had more than one record. This occurred if that individual had entered and been released from ICE custody and was subsequently taken back into ICE custody—for example, when processed for final deportation.

Court Proceedings Involving Class Members. Official records were also obtained for any court proceedings that took place after individuals were placed in ICE custody. These include records from the Immigration Court, the Board of Immigration Appeals (BIA) and the Ninth Circuit Court of Appeals.

These court records were obtained as follows. (1) The Executive Office for Immigration Review (EOIR) furnished official extracts of case-by-case data on Immigration Court and BIA proceedings involving each class member. These files were produced as part of court proceedings in this case and furnished to me. These files contained each individual's alien number and name along with specific details on each Immigration Court and BIA proceeding related to that

person.[2] (2) Data on Ninth Circuit appeals were obtained directly by me from the Ninth Circuit using that court's Public Access to Court Electronic Records (PACER) system. Additional information was provided to me by Petitioners' attorneys compiled from the court records on the specific Ninth Circuit appeals I identified as involving class members.[3]

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[2] Similar to the ICE extracts, EIOR prepared multiple versions of the extract from its CASE database. I used the final version ["EOIR-EDI-006"] which contained the most complete set of records current through April 2012. This version contained additional details on applications for relief that had been originally redacted from earlier versions. In cross-checking the chronology of court proceedings I also used an extract EOIR had prepared for the Transactional records Access Clearinghouse (TRAC) at Syracuse University where I serve as the co-director. The extract EOIR prepared for TRAC contained—in addition to the date fields provided in this case—one additional date field recording when the case began. This was the date the NTA was filed. I used this additional date as a cross-check when confirming the correctness of the date chronology I prepared. Apart from this, the added date field played no role in my analysis.

[3] Using PACER, on September 4, 2012 I downloaded a list of all appeals from BIA court cases received by the Ninth Circuit since December 1, 2007. This data file contained both the Ninth Circuit docket number and the specific BIA docket number recorded on each case, along with the case title, the date the appeal was filed and the last docket entry date for that case. To identify which of these appeals involved class members, I matched the EOIR records on BIA cases against the Ninth Circuit's records to identify each relevant case as follows. Both sets of records contained fields recording the BIA docket number for each case as well as the associated Ninth Circuit docket number. (The BIA uses the individual's alien number as its docket number.) Using the BIA docket number from each Ninth Circuit case, I matched it with the BIA docket number—that is, the alien number—recorded for each BIA case in the EOIR files to identify the relevant Ninth Circuit

Among the fields of information recorded on each class member from these court records were the following:

Immigration Court Proceedings:

- the date the Immigration Court case ("proceeding") began
- the type of proceeding involved—removal, deportation, etc.[4]
- the date the Immigration Court case ("proceeding") was completed
- the location of the court assigned the case and the hearing location

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appeals that concerned class members. In addition, I also used the Court of Appeals docket numbers that were recorded in the EOIR files on BIA cases and matched these numbers against the Ninth Circuit docket numbers recorded in the listing of cases I had downloaded using PACER from the Ninth Circuit. This resulted in a list of Ninth Circuit appeals that matched the EOIR files covering class members. On each of these matched cases, I provided the information I downloaded from PACER to Petitioners' attorneys. After reading the court files on each of these cases, they added an entry to this listing indicating whether the Ninth Circuit case had concluded (yes or no), and if it had concluded, the date the mandate had issued. I then added these two additional fields of information to the original data I had downloaded. I then compared the filing and closure dates to the date the class member entered ICE custody. This identified 197 class members that had one or more Ninth Circuit appeals handled subsequent to their entry into ICE custody.

[4] Almost all proceedings for class members were removal proceedings. In this report I use the term "removal" in a general sense to cover all proceedings, even though a few involved other types of proceedings.

- the date each application for relief was filed with the Immigration Court
- the type of relief applied for
- the date each relief application was decided by the court
- the Immigration Court judge's decision on each relief application
- the Immigration Court Judge's decision on the case

Board of Immigration Appeals Proceedings:

- the type of appeal (for example, case appeal, motion to reopen case, remand from court of appeals, etc.)
- the party that filed the appeal
- the date the appeal was filed
- the date the BIA decided the case
- the BIA decision on the appeal

Ninth Circuit Court of Appeal Proceedings:

- the date the appeal was filed
- whether the appeal was closed or was still pending
- when closed, the date the mandate was issued

This information, after it had been combined, allowed me to trace the chronology of court proceedings that had taken place involving each class member.

Research Results

In the following sections, the results from my analysis are provided. There were exactly 1,000 class members.[5] The body of this report covers these 1,000 individuals. I was also asked by Petitioners' attorneys to prepare a parallel set of tables containing key results that pertained to each of two subclasses: the section 236(c) and section 235 subclasses. The lists for each of those class members were provided to me by Petitioners' attorneys. These separate table sets are found in Appendix B and C to this report.

Questions 1 and 2: Detention Times and Status. ***How long have class members spent detained in ICE custody and how many were still detained?***

Using the data provided from ICE records I calculated the number of days that each class member had remained in ICE custody as of April 28, 2012. I also determined their custody status as of that date. Individuals were divided into two categories—those no longer in ICE custody, and those still in ICE custody.

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[5] I received data concerning 1,026 individuals. The information recorded in the files I received indicated that two of these individuals had been detained for less than 180 days and therefore did not qualify for inclusion in the class. Petitioners' attorneys provided me a list of 24 additional individuals from the original list whom they instructed me to exclude because—based upon the attorneys' analysis of the data provided—those individuals also did not meet the qualifications required for class membership. Those individuals had no active proceedings at the administrative or judicial levels during or immediately prior to their detentions, and therefore appeared to have been detained without any pending case. After these two groups (2+24=26) of individuals were removed, this left the set of exactly 1,000 individuals on which my results are based.

The monitoring period covered by my research was only able to follow cases through April 28, 2012 because that was the latest date in the detention records ICE provided on class members. As shown in Table 1, this monitoring period—from entry into ICE custody through April 2012—was sufficient to follow the entire detention period for ninety-five percent of the class members (946 individuals). For these individuals detention times ranged from 180 days—the minimum required to qualify as a class member—up through 1,310 days. See Table 2.

Table 1

Number of Cases by Detention Category*

Detention Category	Number	Percent
No longer detained	946	95%
Still detained	54	5%
All cases	1,000	100%

* As of April 28, 2012

For the remaining five percent (54 individuals) of the class members the monitoring period was insufficient to capture their entire detention period. This was because these individuals were still in ICE custody at the point the records available to me ended. The number of detention days listed for these individuals and used in my analysis *under-estimates* their eventual detention period since it only reflects the number of days they had been detained up to April 28, 2012. Even these under-estimated detention times as shown in

Table 2 were still very long, ranging from 558 days to 1,585 days.

Table 2

Average Days of Detention by Detention Category

	Detention Days		
Detention Category	**Average**	**Lowest**	**Highest**
No longer detained	381	180	1,310
Still detained	805	558	1,585
All cases	404	180	1,585

Overall, and recognizing that the detention figures presented throughout this report will for this reason underestimate actual detention times for this group of class members, the average number of days spent in ICE detention for all class members was 404 days.

To provide a more detailed picture of the experience of class members, Table 3 summarizes how many class members had been detained for varying periods of time. For example, more than three out of four individuals (78%) were detained eight months or longer, and nearly half (47%) were detained 12 months or longer. Over one in five (21%) were detained for 18 months or longer periods.

Table 3

Cases by Detention Period

Detention Period*	Number	Percent
Detained 6 months or more	1,000	100%
Detained 7 months or more	885	89%
Detained 8 months or more	781	78%
Detained 9 months or more	686	69%
Detained 10 months or more	591	59%
Detained 11 months or more	527	53%
Detained 12 months or more.	469	47%
Detained 13 months or more	405	41%
Detained 14 months or more	353	35%
Detained 15 months or more	309	31%
Detained 16 months or more	273	27%
Detained 17 months or more	238	24%
Detained 18 months or more	205	21%
Detained 24 months or more**	86	9%

* Month (30 days).

** This number is likely to be a significant under-estimate because it ignores detention days after April 28, 2012 of the class members who were still detained.

It was not possible to provide an accurate percentage for the proportion of class members detained 24 months or more. This is because while we know the detention period up through at least 18 months for all

class members, we do not know it for all class members beyond that point. Monitoring periods varied by individual. As of April 2012 almost one out of every ten individuals (9%) had been detained for 24 months or longer. However, this proportion is likely to rise when the detention length for each of the 54 individuals who were still detained last April is followed until their custody is at an end.

Table 4 presents the odds of continued detention for individuals already detained for seven months, eight months, nine months, and so forth. These figures are calculated from the numbers shown in Table 3. And as explained, the various odds of continued detention shown for 24 months are under-estimated since they are likely to rise once the complete detention length for all class members is at an end.

Table 4

Odds of Continued Detention

Those detained 7 months:		
	still detained at 12 months	53%
	still detained at 18 months	23%
	still detained at 24 months	10%
Those detained 8 months:		
	still detained at 12 months	60%
	still detained at 18 months	26%
	still detained at 24 months	11%
Those detained 9 months:		
	still detained at 12 months	68%
	still detained at 18 months	30%
	still detained at 24 months	13%
Those detained 10 months:		
	still detained at 12 months	79%
	still detained at 18 months	35%
	still detained at 24 months	15%
Those detained 11 months:		
	still detained at 12 months	89%
	still detained at 18 months	39%
	still detained at 24 months	16%
Those detained 12 months:		
	still detained at 12 months	100%
	still detained at 18 months	44%
	still detained at 24 months	18%

Question 3: Court Proceedings. ***What court proceedings occurred following the individual's detention by ICE? How was this related to the detention times observed?***

Results from the official court records I compiled on court proceedings are summarized in Table 5. These records indicated that Immigration Court proceedings were conducted after ICE placed the individual into custody in almost every case (94%).

In over one out of three cases (36%) an appeal to the Board of Immigration Appeals ("BIA") was filed. (Some of these were filed by ICE appealing an immigration judge's (IJ) decision). Finally, in one out of five cases (20%), an appeal was taken to the Ninth Circuit of Appeals. See Table 5.

Table 5

Court Involvement in Case

Type of Proceedings Involved	Number	Percent
All cases	1,000	100%
Immigration Court proceeding(s)	943	94%
BIA Court proceeding(s)	356	36%
9th Circuit Court proceeding(s)	197	20%

Not unexpectedly, when a case was appealed individuals experienced longer detention times. As shown in Table 6, for cases simply involving Immigration Court proceedings, the average detention time was 330 days. However, the average detention time increased by about a third—from 330 days to 448 days—for cases appealed to the BIA. For cases that were then appealed to the Ninth Circuit, detention times more than

doubled—increasing from 330 days on average to 667 days.

Table 6

Court Involvement and Detention Time

Type of Proceedings Involved	Average Days
Only Immigration Court (IJ) proceeding(s)	330
BIA and Immigration Court proceedings	448
9th Circuit, BIA, and IJ proceedings	667
All cases	404

Question 4: Relief Applications. ***What relief applications were filed with the Immigration Court? How was this related to detention times observed?***

There were 713 class members who filed application(s) for relief with the Immigration Court. This meant that in seven out of ten cases (71%) relief was sought. As shown in Table 7, relief was granted by the immigration judge in more than one out of three of these cases—251 out of 713, or 35 percent.

The judge's decision to grant relief was contested in some of these 251 cases. However, as of April 2012, the grant of relief had become final for over nine out of ten (91%) of these cases—229 out of 251. Of the 22 remaining cases, the grants were reversed in ten cases and the appeals remain pending in 12 cases. This data would not include any individuals denied relief by the immigration judge who then obtain it on appeal at either the BIA or the Ninth Circuit.

Table 7

Applications for Relief

	Comparison Group	Filing for Relief Number	Percent
Number and percent who filed relief application(s)	1,000	713	71%
Number and percent where relief granted by IJ	713	251	35%
Number and percent where relief granted is final outcome*	251	229	91%

* The final outcome is still pending on 12 cases on which relief was granted initially by the Immigration Judge, and in 10 cases the initial decision was later overturned or the individual left the country for other reasons.

Table 8 presents an overview of relief applications by type. Cancellation of removal under Section 240A(a) of the Immigration and Nationality Act ["Form EOIR-42A"] was a common form of relief sought by class members. A total of 256 class members—one in four (26%)—filed applications for relief under this provision. An additional 28 class members, or less than three percent, filed applications only for withholding of removal (WOR) or withholding under the Convention Against Torture (WCAT). The remaining 429 of the class members who sought relief (43%) filed various other types of relief applications.

Table 8

Relief Applications Filed by Type

	Number	Percent
Number of cases	1,000	100%
EOIR-42A applications filed	256	26%
Only applying for WOR/WCAT	28	3%
Other types of applications	429	43%
Total filing relief applications	713	71%

Table 9 summarizes the IJ's decision on relief applications under 240A(a) for cancellation of removal. Exactly half of these applications—128 out of 256—were granted this relief. See Table 9.

Table 9

Application for Cancellation of Removal under 240A(a)

Number of EOIR-42A applications filed	256
Number of these granted by IJ	128
Percent granted	50%

As we saw in Table 8 there were relatively few individuals who only sought relief under WOR or WCAT. Table 10 presents a picture of relief applications that excludes those who only sought, or were only awarded relief, under WOR or WCAT. Not surprisingly, given their relatively small numbers, the same general picture emerges as we saw earlier when we discussed Table 7. Now a total of 685 class members filed relief applications (excluding WOR/WCAT) or more than two out of three (69%). Of those filing applications roughly one third—32 percent—were granted.

Table 10

Applications for Relief
(Excluding Withholding of Removal and WCAT)*

	Comparison Group	Filing for Relief	
		Number	Percent
Number and percent who filed relief application(s)	1,000	685	69%
Number and percent where relief granted by IJ	685	222	32%
Number and percent where relief granted is final outcome**	222	216	97%

* Counts exclude cases where the only application filed, or the only application granted, was for Withholding of Removal or withholding under the Convention Against Torture

** The final outcome is still pending on 4 cases on which relief was granted initially by the Immigration Judge, and in 2 cases the initial decision was later overturned

When relief applications were involved, detention times increased. Individuals who did not request relief had detention times which averaged 360 days, while those requesting relief were detained an average of 421 days, or 61 days longer. See Table 11.

Table 11

Average Detention Days
If Relief Application Filed

Relief Applications	Average Days
No application for relief filed	360
Application for relief filed	421
All cases	404

Table 12 subdivides these relief comparisons by the combination of court proceedings involved. Not only were detention times higher for those requesting relief at the Immigration Court stage, but they were substantially higher at each subsequent court stage.

For example, in cases with only Immigration Court proceedings the individual spent on average 281 days in detention; when applications for relief were filed the average detention time increased to 346 days. For those cases that went on to the BIA, the differential grew to 112 days (from 361 days to 473 days).

Table 12

Detention Time by Proceedings and Relief

Type of Proceedings Involved	Average Detention Days		
	Applied for Relief		All Cases
	No	Yes	
Only Immigration Court (IJ) proceeding(s)	281	346	330
BIA and Immigration Court proceedings	361	473	448
9th Circuit, BIA, and IJ proceedings*	623	681	667
All cases	362	421	404

* Because the majority of individuals are still detained in the large number of cases (72) that are still pending when all three court levels handled the case, these figures underestimate what detention times will eventually reach.

Question 5: Outcome. ***What was the eventual outcome of each class member's court proceeding(s)? Did they ultimately win or lose their case? How was success or failure related to detention times observed?***

The outcome of cases that had been resolved as of April 2012 are shown in Table 13. One in six cases (16%) was still pending as of that date so their outcome was not known. A total of 263 class members—more than one out of every four (26%)—had already won their case.

Less than half of the class members had been removed (44%), and an additional five percent were granted voluntary departures. The remaining nine percent were awaiting deportation after a final removal order had been entered.

Table 13

Outcome of Case*

Outcome	Number	Percent
Won case	263	26%
Case still pending	160	16%
Deportation ordered (not departed)	87	9%
Voluntary departure	46	5%
Removal	444	44%
All cases	1,000	100%

* As of April 28, 2012

Table 14 further subdivides those class members who won their case by the type of decision. Most (87%) were granted relief, while in the remaining 13 percent of the cases the proceedings were terminated.

Table 14

Basis for Winning Case

	Number	Percent
Individual won case	263	100%
Relief granted	229	87%
Case terminated	34	13%

Detention times are shown by outcome in Table 15. Class members who won spent on average 342 days in detention. But detention times ranged as high as 848 days for this group. The longest detention times were experienced for those whose cases were still pending. They had spent, as of April 28, 2012, an average of 545 days in ICE detention, and detention times ranged as high as 1,585 days. The voluntary departure group was detained on average 305 days—the shortest period of time among outcome categories.

Table 15

Average Days of Detention by Outcome*

	Detention Days	
Outcome	Average	Highest
Won case	342	848
Case still pending	545	1,585
Deportation ordered (not departed)	410	1,310
Voluntary departure	305	561
Removal	398	1,133
All cases	404	1,585

* As of April 28, 2012

Those who won their case spent longer periods of time detained where additional proceedings before the BIA or Ninth Circuit Court of Appeals were involved. For example, as shown in Table 16, individuals who won after only Immigration Court proceedings spent on average 320 days in detention. However, those who prevailed only after both BIA and Immigration Court proceedings spent about 60 percent longer on average in detention—509 days as compared to 320 days.

Table 16

Detention Time for Class Members Who Won Their Case
Level of Court Proceedings Reached

Type of Proceedings Involved	Average Days
Won case	342
Won with only Immigration Court (IJ) proceeding(s)	320
Won after BIA and Immigration Court proceedings	509
Won after 9th Circuit, BIA, and IJ proceedings	*428

* Because of the large number of cases (72) still pending involving Ninth Circuit appeals relative to the number this figure is based upon, this figure is likely to significantly under-estimate what detention length will turn out to be for those who eventually win their appeal.

Early results from those who prevailed only after winning a Ninth Circuit appeal similarly show higher detention times, averaging 428 days. However, because of the large number of cases (72) still pending involving Ninth Circuit appeals relative to the number on which this figure is based, this number is likely to significantly under-estimate what the length of detention will turn out to be for those who eventually win their appeal, because the majority of these individuals

are still detained. The average number of detention days as of April 28, 2012 for those still detained in these pending cases had already reached 851 days.

Question 6: Comparing Outcomes in Other Removal Cases. ***How did outcomes for class members compare to typical outcomes in other removal proceedings? Were they more or less successful?***

I next compared class member outcomes with outcomes in removal proceedings more generally. For these comparisons I used figures for the FY 2010-2012 time period published by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University. As noted earlier, I am very familiar with this data as I am the co-director of the Center and direct the preparation of this statistical series.[6]

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[6] Each month, the Executive Office for Immigration Review (EOIR) provides TRAC with a copy of its official court records in the form of an extract from its CASE database. This is the same type of case-by-case data EOIR furnished regarding class members in this litigation, which I used for the other sections in this report. The data provided to TRAC covers all Immigration Court proceedings in the country and is furnished without any identifiers to preserve the privacy of the individuals appearing in these removal proceedings. TRAC uses this data to publish regular reports on Immigration Court proceedings available on its website at: http:// trac.syr.edu/immigration. TRAC also provides a web interface (http://trac.syr.edu/immigration/tools) to allow the public to query the database TRAC has compiled from these court records providing information on new proceedings filed, cases completed, court outcomes, the court's backlog, and wait and completion times. Results reported here are taken directly from this source using data current as of August 31, 2012 and covers all removal orders, voluntary departure orders, termination decisions and decisions granting relief.

Table 17 presents a side-by-side comparison of outcomes in these removal proceedings. For these comparisons, I focused on the outcomes for the 840 class members on which a decision had been reached, excluding those on which the matter was still pending before the courts. As noted earlier, 263 of these class members had won their case. This represents 31 percent of the cases decided to date. Of these 263 who had won, 229 class members had been granted relief, or 27 percent of all decided cases. See figures in column labeled "Class Members" in Table 17.

Table 17

Comparing Outcomes in Removal Proceedings

	United States (majority not detained)*	Mira Loma Detention Facility*	Class Members
Removal proceedings decided	608,129	9,355	840
Number won by individual**	163,907	669	263
Number relief granted	90,865	514	229
Percent won by individual	27%	7%	31%
Percent granted relief	15%	5%	27%

* Immigration Court records current as of August 31, 2012 for the period FY 2010 - 2012. According to the latest published EOIR figures, for the U.S. non-detained cases made up 58% (FY 2011) and 56% (FY 2010) of proceedings, while Mira Loma hearings are just for detainees

** Includes cases granting relief and terminated.

Nationally during this time period there were 608,129 removal proceedings decided by the Immigration Court. The majority of these proceedings involved non-detained cases. Individuals won just over one out of every four (27%) of these cases. Relief was granted in 15 percent of the cases, while proceedings were terminated in the remaining 12 percent. See column labeled "United States" in Table 17.

Comparing the results for the U.S. with those for our class members, we see that class members were more successful. While in the U.S. 27 percent won the decision in their case, for class members wins were higher—31 percent. Relief in particular was granted at over twice the rate that occurred in removal proceedings nationally. Because, in general, Immigration Court statistics show that non-detained individuals have far higher success rates than individuals who are detained, the fact that the reverse is true here is noteworthy.

I next compared the outcomes for class members to those in Immigration Court removal hearings conducted at the Mira Loma Detention Facility. Unlike the hearings reflected in the national statistics, the hearings in Mira Loma all involved only individuals detained in ICE custody. This particular location was chosen because the majority of class members had their hearings at this specific location, and because it allows a comparison to a group of exclusively detained cases.

As shown in Table 17 there were 9,355 removal proceedings decided at the Mira Loma Detention Facility during this time period. Of these, 669 individuals won their case, including 514 individuals who were granted

relief. This means that only 7 percent of Mira Loma detainees won their case. Five percent were granted relief, while the remaining 2 percent had their proceedings terminated. See column labeled "Mira Loma Detention Facility" in Table 17.

The comparison of Mira Loma detainees to the class members is stark. Class members were successful four times more often—31% versus 7%—than Mira Loma detainees were on the whole. And class members were awarded relief five times more often—27% versus 5%—than Mira Loma detainees overall were.

Question 7: Aggregate Detention Days. ***How does average detention time relate to aggregate detention space needed?***

Thus far we have examined detention from the perspective of the individual who is being detained. The same data, however, can be examined from the perspective of the agency responsible for providing detention space and for paying to house these individuals while they are detained.

How many detention beds in aggregate were needed to cover the detention needs for one year for class members once individuals qualified as class members—that is, those who had already been detained for 180 days?

The answer to this question is shown in Table 18. The first row shows the aggregate number of days class members spent for the initial 180 days. The second row shows the aggregate number of days class members remained detained during the following one year period.

Table 18

Aggregate Detention Days

Time Period	Class Members
First 180 days	180,000
Next year (365 days)	184,067
Subtotal	364,067
More than 18 months	(insufficient data)*
Total detention days	(insufficient data)*

* monitoring period varied by class member but was designed to ensure information for 180 days plus one year (365 days) for all individuals; because monitoring period then ended one cannot derive valid numbers for subsequent time periods. The total aggregate days for class members as of April 2012 had reached 403,660.

All individuals were, by virtue of being class members, detained for the entire initial 180 days period. As shown in Table 18, this meant that, in aggregate, facilities with capacity to house individuals for 180,000 detention days were needed to house them. (This represents 1,000 class members x 180 days = 180,000 detention days.)

For the next year the facilities required to house class members totaled 184,067 detention days. Because some class members were released from detention or deported during this year, the figure shown in Table 18 was calculated by examining the detention days each individual spent during that following 365 days period and then summed to derive the total aggregate days of 184,067.

This figure excludes the aggregate detention days needed for the first 180 days of their detention. When this is added, the aggregate detention days for the first 18 months—180 initial days plus the subsequent year—were 364,067. See Table 18.

These figures, however only include detention through the first year (plus 180 days). However, from earlier Table 3, we know that more than one in five persons (21%) were detained for periods of 18 months or more. In fact, one individual was detained for 1,585 days (over four years.)

Unfortunately, the data available are insufficient to calculate what the aggregate detention days would be after one year. While the monitoring period varied somewhat by class member, it was only designed to ensure information for 180 days plus one year (365 days) for all individuals—the period covered by the figures shown. Thus the 364,067 days figure presented in Table 18 significantly under-estimates what the aggregate number of detention days will eventually total for class members since it omits all detention time after 18 months.

The total aggregate days for class members as of April 2012 had already reached 403,660 days but, for the reasons explained above, this figure does not fully capture what the total will become since it reflects the number of days class members had been detained only up to April 28, 2012.

Subclass Data

In addition to the class-wide research, I also analyzed data specific to two of the subclasses: the section 236(c) and section 235 subclasses. Because I am not

familiar with the operation of the detention statutes and subclasses in this case, I relied on Petitioners' attorneys to provide me with a list of individuals who qualified as subclass members, which I then used to compile the data specific to each subclass.

With respect to the section 236(c) subclass, I was provided with a list of 460 subclass members. I cannot speak to the accuracy of this list. Information about the 236(c) subclass is contained in Tables 19-26 in Appendix B.

With respect to the section 235 subclass, I was provided with a list of 68 subclass members. I understand that Petitioners' attorneys believe that this list is a sample of the section 235 subclass drawn from those for whom Respondents produced parole worksheets. According to Petitioners' attorneys, the overall subclass size may be larger, but the sample is representative of the subclass as a whole. I cannot speak to the accuracy of those claims. Information about the section 235 subclass is contained in Tables 27-31 in Appendix C.

* * * * *

Appendix B: Results for Section 236(c) Subclass

There were a total of 460 individuals in the Section 236(c) subclass. Table 19 shows that 5 percent of these individuals were still detained as of April 2012 when data coverage ended.

Table 19

Number of Cases by Detention Category: Section 236(c) Subclass*

Detention Category	Number	Percent
No longer detained	437	95%
Still detained	23	5%
All cases	460	100%

* As of April 28, 2012

As of last April, Individuals had been detained on average for 427 days. Detention times, however, ranged as high as 1,585 days. See Table 20.

Table 20

Average Days of Detention by Detention Category: Section 236(c) Subclass*

	Detention Days		
Detention Category	Average	Lowest	Highest
No longer detained	406	180	1,310
Still detained	827	558	1,585
All cases	427	180	1,585

* As of April 28, 2012

As shown in Table 21, about three out of four (73%) applied for relief, and more than 40 percent of the individuals who applied were granted relief by the immigration judge.

Table 21

Applications for Relief:
Section 236(c) Subclass

	Comparison Group	Filing for Relief	
		Number	Percent
Number and percent who filed relief application(s)	460	338	73%
Number and percent where relief granted by IJ	338	137	41%
Number and percent where relief granted is final outcome	137	130	95%

Table 22 gives figures on the types of relief for which 236(c) class members applied. About half of class members (49%) filed an EOIR-42A application. Just a few (3%) applied only for WOR/WCAT.

Table 22

Relief Applications Filed by Type:
Section 236(c) Subclass

	Number	Percent
Number of cases	460	100%
EOIR-42A applications filed	225	49%
Only applying for WOR/WCAT	14	3%
Other types of applications	99	22%
Total filing relief applications	338	73%

An analysis was also conducted excluding individuals who had only applied for relief, or had only been granted relief, under WOR/WCAT. These results are shown in Table 23. Because so few individuals were affected by this exclusion, results shown in Table 23 generally show a very similar pattern to what we saw earlier in Table 21 covering all applications for relief.

Table 23

Applications for Relief: Section 236(c) Subclass (Excluding Withholding of Removal and WCAT)*

	Comparison Group	Filing for Relief Number	Filing for Relief Percent
Number and percent who filed relief application(s)	460	324	70%
Number and percent where relief granted by IJ	324	126	39%
Number and percent where relief granted is final outcome	126	124	98%

* Counts exclude cases where the only application filed, or the only application granted, was for Withholding of Removal or withholding under the Convention Against Torture.

Just as for the class as a whole, applying for relief increased the average detention time a person was held in ICE custody under 236(c). The average detention days for class members who did and did not apply for relief are shown in Table 24.

Table 24

Detention Days If Relief Application Filed: Section 236(c) Subclass

Relief Applications	Average Days
No application for relief filed	383
Application for relief filed	443
All cases	427

One in three subclass members (33%) won their case, while for an additional 11 percent the case was still pending at the end of April 2012. See Table 25.

Table 25

Outcome of Case:
Section 236(c) Subclass*

Outcome	Number	Percent
Won case	150	33%
Case still pending	51	11%
Deportation ordered (not departed)	36	8%
Voluntary departure	5	1%
Removal	218	47%
All cases	460	100%

* As of April 28, 2012

Of the 150 subclass members who had won their case, 130 were granted relief while the proceeding(s) for the remaining 20 had been terminated. See Table 26.

Table 26

Basis for Winning Case:
Section 236(c) Subclass

	Number	Percent
Individual won case	150	100%
Relief granted	130	87%
Case terminated	20	13%

Appendix C: Tables for Section 235 Subclass

There were a total of 68 individuals identified by Petitioners' counsel for purposes of my analysis of the Section 235 subclass. It is my understanding that this likely does not include all individuals in that class. No subclass member was still in custody at the end of the monitoring period. Table 27 shows that on average subclass members spent 346 days in detention, although detention time ranged as high as 831 days.

Table 27

Detention Days:
Section 235 Subclass*

	Value
Number of cases	68
Average detention days	346
Lowest detention days	180
Highest detention days	831

* All are no longer detained (as of April 28, 2012).

Almost all (97%) of Section 235 subclass members filed applications for relief. The immigration judge granted them relief almost two-thirds of the time (64%). See Table 28.

Table 28

Applications for Relief: Section 235 Subclass

	Comparison Group	Filing for Relief	
		Number	Percent
Number and percent who filed relief application(s)	68	66	97%
Number and percent where relief granted by IJ	66	42	64%
Number and percent where relief granted is final outcome	42	41	98%

The types of relief applied for are shown in Table 29. Only a single individual applied for relief only under WOR/WCAT.

Table 29

Relief Applications Filed by Type:
Section 235 Subclass

	Number	Percent
Number of cases	68	100%
EOIR-42A applications filed	0	0%
Only applying for WOR/WCAT	1	1%
Other types of applications	65	96%
Total filing relief applications	66	97%

Table 30 presents results on relief applications after those who only sought or were granted relief under WOR/WCAT are excluded. Results shown in Table 30 below are virtually unchanged from what we saw earlier in Table 28.

Table 30

Applications for Relief: Section 235 Subclass
(Excluding Withholding of Removal and WCAT)*

	Comparison Group	Filing for Relief	
		Number	Percent
Number and percent who filed relief application(s)	68	65	96%
Number and percent where relief granted by IJ	65	41	63%
Number and percent where relief granted is final outcome	41	41	100%

* Counts exclude cases where the only application filed, or the only application granted, was for Withholding of Removal or withholding under the Convention Against Torture

Six out of ten individuals (60%) won their case. Two cases were still pending at the end of April 2012. Case outcomes are shown in Table 31.

Table 31

Outcome of Case:
Section 235 Subclass*

Outcome	Number	Percent
Won case	41	60%
Case still pending	2	3%
Deportation ordered (not departed)	18	26%
Voluntary departure	0	0%
Removal	7	10%
All cases	68	100%

* As of April 28, 2012

Rebuttal Expert Report of Professor Susan B. Long

Rodriguez v. Hayes, No. 07-3239 (C.D. Cal.)

Submitted Pursuant to Federal Rule
of Civil Procedure 26(a)(2)

Introduction

I submit this rebuttal report as an expert, and at the request of Petitioners in *Rodriguez v. Hayes*. This report was prepared to respond to two issues raised in the government's Expert Statistical Report of October 12, 2012, authored by Dr. Chester I. Palmer. The two issues covered in this report are:

Issue One: Was the data on "adjournments" on which Dr. Palmer based his analyses reliable?

Issue Two: If I had used the in-period sampling approach suggested by Dr. Palmer in my original report, would the results reported in my original report have materially changed?

Summary of Findings

- Issue One: The data on adjournments on which Dr. Palmer based his analyses is not reliable.

I assessed the reliability of the adjournment data by examining the internal consistency between adjournments recorded in the "schedule" table and adjournments recorded in the "actions" table of the EOIR database. There are over 900 adjournments recorded (almost 20% of the total) in the "actions" table that have no corresponding adjournment recorded in the "schedule" table within six days of the date on which the "action" allegedly occurred. Conversely, there

are well over 500 adjournments recorded in the "schedule" table with no matching adjournment in the "actions" table (over 10% of the total). Upon examination, there was no discernible pattern indicating that this inconsistency affects only particular types of adjournments. In fact, it affects many of the adjournments that Dr. Palmer's report classified as "alien-caused delays." The extremely high rate of inconsistency in the adjournments data render it unreliable as an information source for the analysis that Dr. Palmer undertook.

These findings are consistent with my prior experience with the "schedule" table. I attempted to rely on the "schedule" table for a study I conducted in 2009 and, based on my review of the data and conversations with immigration judges at that time, found that it was not reliable for the purpose for which I sought to use it.

- Issue Two: Use of the in-period sampling approach suggested by Dr. Palmer does not materially change the results reported in my original report.

In his report, Dr. Palmer suggested that the population on which my analysis was based was subject to a "selection" bias insofar as some detainees held for longer periods of time have a greater chance of inclusion. Dr. Palmer suggested that it would be more appropriate to use an in-period sample, although that sample would have to be adjusted for censoring bias because the outcome and detention length for some sample members was not known. While my approach was appropriate given the questions I was asked to answer in my report and the available data, I nonetheless carried out the in-period sampling approach sug-

gested by Dr. Palmer to determine if his approach would produce materially different results—that is, *lower* values for detainee success or detention length. I conclude that it would not.

With respect to the outcomes of class members' cases, I found that using an in-period sample produced comparable, although somewhat higher, estimates of class members' success rates than the results from my original report. In-period detainees are likely to have a successful outcome approximately 35% of the time. Consistent with my prior results, an analysis of the in-period sample showed substantially higher success rates for class members compared with results for the U.S. as a whole (where the majority of individuals were not detained), and stark differences as compared with success rates for all detainees at the Mira Loma Detention Facility. Results concerning relief applications for the in-period sample also show that a slightly higher proportion of class members applied for relief, and that they were slightly more successful, than I reported in my original report.

With respect to the detention lengths of class members, it is far more challenging to develop reliable estimates for the in-period sample because a significant number of individuals in that sample were detained as of the time the data was obtained, making it impossible to know how long they will ultimately be detained. To account for this "censoring" bias, I used two different methods to estimate detention length utilizing other available sources of data. However, those methods produced detention time estimates substantially longer than those in my original report. I concluded that because these approaches rely on addi-

tional data to correct for censoring bias, and because they lead to results showing substantially longer detention times than those reflected by my initial report (which analyzed only class members), they are likely not reliable. In the absence of a reliable source of data from which to correct the censoring bias, I employed a "self-balancing" method utilizing the in-period and out-period data to estimate detention lengths. This is the standard method used by statisticians in situations such as this, where two sources of bias operate in opposing directions. This method, which I believe to be the more conservative approach, is equivalent to the analysis in my original report and produces the same results previously reported on detention length. I believe those results are the most accurate available measures of detention length for purposes of determining class members' detention length given the available data.

I. *Issue One: Reliability of EOIR data on "adjournments"*

Dr. Palmer's report contained an analysis of the "adjournments" in class members' cases based on data provided to him by the government. However, the information on which Dr. Palmer based his conclusions is not reliable because there is significant internal inconsistency in the adjournment information in the data. This conclusion is consistent with my prior experience analyzing the source of the adjournment data.

I assessed the reliability of the adjournment data by examining its internal consistency. Because there are multiple sources of information on adjournments in the EOIR Access database that was provided in discovery in this case, one can use the sources to check their

consistency. At least two tables within the EOIR Access database contain information on adjournments: (1) the "schedule" table, on which Dr. Palmer relied for his analysis[1]; and (2) the "actions" table, which contains information regarding "actions" taken in a case, including adjournments. However, the two tables do not contain identical categories of information on adjournments. The "actions" table lists only the date and the fact that an adjournment was taken, and does not contain an "adjournment code" that indicates the reason for the adjournment.

To assess the reliability of adjournment data, I compared the adjournments recorded in the "schedule" and "actions" table for proceedings during the April 2010-April 2012 period.[2] A comparison of the ad-

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[1] As Dr. Palmer explains in his report, he primarily relied on a spreadsheet entitled "AC Delays.xls" that contained "information on the dates of hearings, with codes indicating whether each hearing was adjourned and, if so, whether the adjournment was requested by the alien." It is my understanding that the information on dates of hearings and adjournment codes was derived from the "schedule" table in the EOIR Access database that was produced in discovery in this case.

[2] To provide as accurate gauge of the internal consistency of data in the requisite time period, I focused only on hearings scheduled between April 2010–April 2012 in the "schedule" table, and adjournment entries in the "actions" table that occurred between these two dates. To help ensure that results were insensitive to assumptions concerning how to perform the match, I re-ran my analysis several ways. To look at "match" rates, I began by consolidating records from the schedule table that had multiple records for the same date into a single record. I ran the analysis first on this entire set, and then again on a set which, consistent with Dr. Palmer's analysis, eliminated the entries in the "schedule" table with the adjournment code "99" (defined as "data entry error") and

journment information in the two tables reveals significant inconsistencies in the data. As an initial matter, there were materially different counts of adjournments entries reflected in the "schedule" (4,669) and "actions" tables (5,001). In total, there were 332 (roughly 7%) more adjournments recorded in the "actions" table. This represents a fairly high error rate, even if we assume that the remaining adjournments recorded were consistent (i.e., conducted on the same date)—which, as I explain below, they are not.

An analysis of the dates on which adjournments were recorded reveals even greater inconsistencies in the data. For the 4,669 adjournments recorded in the "schedule" table, only 3,538 (76%) had a corresponding adjournment entered in the "actions" table with an identical date match. However, this does not necessarily indicate error in the remaining adjournments because, for a variety of reasons, it is conceivable that

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also eliminated the entries in the "schedule" table where no adjournment code was entered. This was done because the lack of a reason given could indicate that no adjournment in fact occurred. With respect to the "99" and "blank" adjournment codes, I found that their inclusion or exclusion did not materially affect the "match" rate (in part because there were a small number of "matches" for those entries in the "actions" table). With respect to the records in the "actions" table, I also consolidated any adjournment records on the same date for a given case into a single record when I ran the analysis. Sometimes the adjournment records indicated they had been "Edited" rather than "Added." So I re-ran the analysis again after screening out the "Edited" adjournment records. The "match" rates were comparable under these different methods. For simplicity, I report the "match" rates for my final analysis where I eliminated blank or '99' entries in the adjournment code field and also eliminated "Edited" adjournment entries from the actions table.

an adjournment may be recorded in the "schedule" and "actions" tables on different dates, or recorded as entered on different dates (although this delay could undermine the reliability of the reasons attributed to the adjournments). To account for this possibility, I compared how often the adjournments recorded in the "schedule" and "actions" tables fell within a six day range of each other (that is, plus/minus three days). Although it might be appropriate to select a smaller range to assess error rate, I selected a broad enough range that would account for any reasonable delay in data entry.

Table 32

Comparison of Adjournment Entries in Schedule and Actions Tables*

	Number
Schedule Table: hearings listed with an adjournment reason	4,669
Actions Table: adjournment entries	5,001
Dates matched:	
Adjournment dates the same	3,538
Dates loosely match (within six day range - plus/minus 3 days)	555
No matching date within six-day range of each other:	
Adjournment entry in Actions Table not in Schedules Table	908
Adjournment entry in Schedule Table not in Actions Table	576
Subtotal - not matched	1,484

* Exclude records where adjournment reason blank or code '99' and all actions where adjournment action was "Edited" rather than "Added"

As the above table indicates, there were significant numbers of adjournments in the "schedule" and "actions" table that had no matching date within a six day range. 908 of the adjournment entries (18%) in the "actions" table did not have a match within six days in the "schedule" table. Conversely, 576 of the adjournment entries (12%) in the "schedule" table did not have

a match within six days in the "actions" table. In total, there were 1,484 adjournment entries across the two tables where their dates were not within a six-day range. This is a very high number—especially compared to the total number of original entries in either table—4,669 in the "schedule" table, and 5,001 in the "actions" table.

I next carried out further analyses to see whether there were particular adjournment codes where this "no match" problem occurred. I found that the inconsistencies in the dates for adjournments did not appear to be limited to any one type or class of adjournment. For this analysis, I located the adjournment reasons that had been entered for the case and date for each "no match" record in the "schedule" table. I then analyzed the number and percent of "no match" entries for the adjournment codes. I concluded that, while there was some variability in the "no match" rates, there were "no matches" for all adjournment codes except for a few codes that occurred very infrequently in the "schedule" table.[3]

In particular, I found no discernible pattern in the types of adjournment codes where "no matches" occurred. I looked especially at the adjournment codes that Dr. Palmer's report attributed as "alien request-

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[3] For this analysis I could not consider adjournments that were recorded in the "actions" table but where there was no matching entry in the "schedule" table since the actions table did not contain the adjournment reason code. That is I started with 576 unmatched records. Accordingly this part of my analysis had to ignore the substantially larger number of occasions—908—where the "actions" table contained an adjournment but no match was found in the "schedule" table.

ed" and found a significant "no match" rate for these as well.

These estimates likely underestimate the error rate in the data because my analysis considered only the presence or absence of an adjournment entry. There were other variables included in the "schedule" table—including the "reason" for an adjournment—that could also be sources of error but were not included in this analysis since there was no corresponding adjournment code recorded in the "actions" table with which it could be compared.

In light of the significant inconsistency with the "actions" table, it is my opinion that the adjournment information in the "schedule" table is not sufficiently reliable for the type of analysis that Dr. Palmer attempted to conduct. While there will always be errors in any large data source, when the errors or inconsistencies in a data set become severe, those data fields cannot be relied upon to draw valid statistical conclusions. Although the exact rate of error at which a data field becomes unreliable depends in part on the purpose for which it is used—and even then reasonable minds may differ on the tipping point at which the data is no longer useful—in my judgment, the high rate of inconsistencies between the "schedule" table and the "actions" table renders the "schedule" table unreliable for the analysis undertaken in Dr. Palmer's report.

My conclusion is reinforced by my prior experience working with the "schedule" table data. In 2009, I conducted a study on the workload of immigration judges that relied in part on data provided by EOIR, including data from the case, proceedings, charge,

court applications, and the "schedule" tables. My study also involved interviews of immigration judges. I had originally planned to base a good part of my results on the data in the "schedule" table. However, when I provided immigration judges with copies of the tables for their own schedules and that of their colleagues, the judges I interviewed pointed to numerous inaccuracies in them and advised me that they did not believe the "schedule" table accurately reflected what they knew had taken place. Given this advice, I discontinued my use of the schedule table and did not rely upon it in deriving my results. While it is possible that the data in the "schedule" table has improved since that time, my review of the "schedule" table in this case strongly suggests that numerous problems remain.

II. Issue Two: Use of in-period detainees to measure outcomes and detention length

In his report, Dr. Palmer suggested that it would be more appropriate to use an in-period sample for my analysis because the population on which my analysis was based was subject to a "selection" bias. While my approach was appropriate given the questions I addressed in my report and the available data, I nonetheless carried out the in-period sampling approach suggested by Dr. Palmer to determine if his approach would produce materially different results—that is, lower values. I conclude that it would not.

With respect to the outcome of class members' cases, I found that using an in-period sample produced somewhat higher estimates of class members' success rates than the results in my original report. Consistent with my prior results, an analysis of the in-period

sample showed materially higher success rates for class members compared with results for the U.S. as a whole (where the majority of individuals were not detained) as well as stark differences with success rates for all detainees at the Mira Loma Detention Facility. Results concerning relief applications for the in-period sample show that a slightly higher proportion of class members applied for relief and that they were slightly more successful than I had reported in my original report.

It is far more challenging to develop reliable estimates of detention lengths for the in-period sample because a significant number of individuals in that sample remain detained. To account for this "censoring" bias, I applied two additional standard methods coupled with other available data to estimate the likely detention lengths for those members of the in-period sample who remain detained. Those standard methods produce detention lengths that are distinctively higher than in my initial report—that is, they show substantially longer average detention periods. Because these estimates rely upon additional data to correct for censoring bias that may not be reliable, and because they produce results that are markedly different from (and longer than) those produced in my original report, I ultimately reject them. I believe a more conservative approach is to use the self-balancing method that is commonly employed when both selection bias and censoring bias are present in the data. The self-balancing method is equivalent to the analysis in my original report and produces the same results reported there on detention length.

A. Preliminary Considerations

1. *Using Data About the Universe vs. Only a Sample*

In my initial report, I was asked to provide information on the class members whose information I was given as though they constituted the universe of the relevant population. In this case, an analysis that treats the class members whose information we have as the universe of cases may be preferable to an analysis limited to just a sample of cases selected from that universe, for a number of reasons. First, because *more* individuals are included in the universe, results can usefully examine the outcome for smaller subgroups within the data. Second, the methodology of sampling inherently introduces additional imprecision into the results about the class as a whole. Statisticians refer to this imprecision as "sampling error." Third, analysis based upon the universe of cases uses concrete data about actual class members. Accordingly, unlike with sampling, results derived from analysis of that universe is based on what has actually occurred, rather than on what anyone assumes *might* occur.

However, there are occasions when a sampling approach may be preferred, such as when analysis of the universe of cases leads to bias. Dr. Palmer suggests that the data from this particular universe—all class members detained for at least 180 days and in the Los Angeles area at any time during the period between April 2010 and April 2011—may lead to biased results if all class members did not have the *exact same probability* of inclusion. Statisticians refer to this phenomenon as "selection bias." Dr. Palmer suggests

that this selection bias might, under some circumstances, be expected to lead to over-estimation of detention length. He then attempts to adjust for this selection bias by restricting his analysis to a sample of individuals drawn from the universe who were in custody during their 181st day during this period (the "in-period" sample).

However, Dr. Palmer's method leaves other sources of bias unaddressed. One of these, which is present in this data, statisticians refer to as "censoring" bias. As I mentioned in my earlier report, the data available were incomplete because individuals were not followed long enough to know either the eventual outcome for every case or the entire length of each detention period. This bias can be expected to lead to underestimating the eventual success of class members and their detention length.

As I noted in my earlier report, even when utilizing the data we have about all class members, "censoring" bias is present to some degree because we only know the ultimate outcome and detention length for individuals whose cases had *already* concluded. When one uses just an in-period sample of those class members, the "censoring" bias is magnified, because the percentage of individuals whose cases have not yet concluded rises.

2. Methodology for This Report

To assess whether Dr. Palmer's suggested method would produce materially different results from those provided in my original report, I re-analyzed the same data I used before. This time I followed the in-period sampling approach suggested by Dr. Palmer.

This re-analysis involved the following steps. First, I defined the "population" of interest to determine which individuals properly fell into the "in-period" sample for this population. Second, I performed the same analysis I conducted earlier, but just on this "in-period" sample. Where sources of bias were substantial, I used standard techniques for estimation to counteract that bias.

3. Defining the Proper In-Period Sample

Before one can apply a sampling approach, one must have a clear definition of what statisticians refer to as the *population of interest*. This is required if, as Dr. Palmer states, one wants to ensure that "all cases of interest have the same probability of selection for the sample" from this population. The implicit assumption inherent in such a method is that the "population of interest" is not simply class members during the April 2010-April 2011 period (the universe that my original report analyzed), but individuals who will qualify as class members subsequent to April 2011 and continuing on into the future.

It is worth noting at the outset that strictly speaking the in-period sampling methodology suggested by Dr. Palmer does not ensure that everyone in the population of interest has the same probability of selection. Indeed, individuals who only qualify as class members subsequent to April 2011 have no chance of being selected in the sample because we have no data concerning them. In addition, other factors that gave rise to the outcomes of interest—including the various factors impacting who ICE detains and, once detained, the class members' length of detention and ultimate success or failure—may change in the future. (For ex-

ample, we already know that the length of time immigration judges are taking to dispose of cases has been generally rising, which presumably has an impact upon how long future class members may take to obtain a final decision and therefore their length of detention.)

Nonetheless, I utilized Dr. Palmer's general method by treating class members detained during the April 2010-April 2011 period as a sample from which to draw conclusions about class members who have been or will be detained after that time period. I treated all individuals who will qualify as class members subsequent to April 2011 and continuing on into the future as encompassed within the population of interest.

During the course of preparing this analysis, and after consulting with Petitioners' counsel, I also made further adjustments to exclude individuals who were not class members but whose data were included in the initial information provided to me.

Out of the 1,026 records the government provided in the universe, there were a total of 83 individuals who Petitioners' attorneys instructed me were not properly part of the *population*,[4] leaving a total of 943 class

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[4] I excluded people from the original 1,026 data entries for the following reasons. First, there were two individuals that were not detained for 180 days. Second, there were an additional 24 individuals that had no ongoing administrative or judicial proceeding at any time subsequent to their entry into ICE custody. Prior to my completing my original report, I notified Petitioners' counsel about the existence of those individuals and they instructed me to exclude them from my analysis. The exclusion of the first two groups is discussed at page 4 and in footnote 5 of my original report. Upon preparing the analysis for this report, I discovered additional individuals for whom a final decision in their case already had been

members (943 = 1,026 - 83) from which to select the "in-period" sample. Applying the same methodology Dr. Palmer recommended—selecting class members who reached their 181st day of detention during the April 2010–April 2011 period—resulted in an in-period sample of 595 class members.[5]

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reached by the time they reached 180 days of detention. Thus, there was no ongoing administrative or judicial proceeding that prevented the government from deporting such individuals. After discussing the issue with Petitioners' counsel, they instructed me to exclude 57 individuals from my analysis for this report because they had concluded that these individuals were not class members. To assist the attorneys in their review to confirm that these individuals were not class members, I was asked to provide the field "appeal_rsvd" from the proceedings table which had not been included in the EOIR extract provided in this case, but was included in the extract EOIR prepares on all proceedings for the Transactional Records Access Clearinghouse (TRAC) at Syracuse University where I serve as the co-director. The availability of this data was discussed at footnote 2 in my earlier report.

[5] Dr. Palmer's in-period sample contained 662 individuals. I directly compared the individuals Dr. Palmer used in his sample with those contained in my sample using a file which Dr. Palmer provided listing the alien numbers in his "in-period" sample. The main reason for the differences between my sample and his was that he failed to exclude 81 of the 83 individuals from the data the government provided who were not class members. There also were other minor differences, although they do not affect the analysis in a material way. For example, for some reason, Dr. Palmer did not report receiving a complete list of the 1,026 individuals that was originally provided to Petitioners' attorneys in the initial data release; Dr. Palmer reports (at page 8 of his report) only receiving a list of "1,021 distinct alien numbers." Further, as explained at page 6 of his report Dr. Palmer excluded six individuals because he was concerned about differences in the names on these records. I did not exclude any individual on this basis. (I examined the data on these six individuals and found that the possible name discrep-

4. Identifying the Presence of Censoring Bias

Next I examined the data for the in-period sample to determine in how many cases the data had ended before the individual's court proceedings and detention history had reached their conclusions. As noted above, bias resulting from having incomplete information because cases are not followed long enough is referred to as "censoring bias."

Censoring bias was a significant problem in the in-period sample. As shown in Table 33, individuals had not been followed long enough for their cases to conclude in nearly one out of every five cases (18%). A total of 105 out of the 595 class members in the sample had data which was "censored" in this manner.

Table 33

Cases with Censored Data in Sample

	Number	Percent
Censored cases	105	18%
Remaining cases	490	82%
All cases	595	100%

In 104 out of these 105 cases the case was still pending and no final outcome had occurred. (In the remaining

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ancies that Dr. Palmer was apparently concerned about disappeared once records were restricted to the period of time beginning when these individuals entered ICE custody. Since the names were entirely consistent for the time period relied upon, whether or not these old records concerned the same or different individuals had no bearing on this analysis.)

case, the individual was still detained even though the data available indicated that a removal order had been entered and no additional information on any subsequent proceeding was located. Therefore, I treated the case as closed).[6]

Given the prevalence of censoring in the data for this in-period sample of class members, sample estimates must include an adjustment for their potential biasing effects. Thus, I adjusted the sample estimates using standard methodologies to correct for censoring bias. Then I compared the resulting in-period sample estimates with my original findings to see whether they have materially changed. As noted above, they do not.

Because the potential effects of selection bias as well as censoring bias may vary depending upon the specific purposes for which the data are being used, I divide my discussion into three sections based upon the type of measures or questions being addressed. First, I discuss findings related to outcome—whether the class members win or lose their cases. Next, I discuss results concerning the process in class members' cases—

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[6] Using the ICE information on detention current as of September 27, 2012 from ICE-EDI-010, which I received after my original report was prepared, I was able to determine that, as of that date, 19 sample members remained in detention. However, as long as proceedings continue and a final outcome has not been reached, this number can change either up or down. Even if a class member had been released from detention, the data show he or she can be placed back into ICE custody. For example, one class member was placed back into ICE custody on the day following an adverse decision by the BIA and remained detained during the class member's Ninth Circuit appeal. While he was counted as not detained in my earlier report, he is counted as detained here.

the types of proceedings involved, and types of relief requested. Finally, I discuss findings concerning detention length.[7]

B. Class Member Outcomes

1. *Success Rates*

The results initially reported on case outcomes are not materially affected by use of an in-period sampling approach. As Table 34 shows, a total of 176 individuals among the 595 class members in our sample had already won their case (30%). This number is higher than that found in my original report (26%). But there were an additional 104 individuals for whom their final outcome was unknown because their cases were still pending.

Given the already high "win" rate, it would not be reasonable to assume that in every one of the 104 pending matters the class member will eventually lose. Thus, some censoring bias clearly exists with respect to case outcomes. Perhaps the most common way to correct for this obvious bias is to use information from prior time periods for the adjustment. For example, if we can determine from prior periods what proportion of cases will eventually be won we can use this information to adjust the proportion of cases in the sample that are likely to be successful. The only data available, however, are the 348 class members in the population who were not in the in-period sample. Although

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[7] The analysis in Table 18 of my original report on aggregate detention days is not repeated here because Dr. Palmer and I are in agreement that selection bias should not be an issue when answering this question. See page 5 of Dr. Palmer's report discussing sampling approaches for measuring workload.

these individuals were followed for somewhat longer periods, 16 percent of these cases also were still pending at the time the data was obtained. Thus, the degree of censoring bias from this data with respect to outcome is only marginally lower than the degree for our in-period sample.

We are therefore left with having to make some further assumption for this adjustment. Without more data, the most straightforward approach is to assume the success rate for outstanding cases in the sample is similar to the success rate for cases that have already been concluded. This was the approach I used.

Table 34 presents these results, and compares them to those I reported earlier in Table 17 of my original report. In my original report, 26% had won their case. For the in-period sample, a higher percentage —30%—had won their case even before applying an adjustment for censoring bias.[8] Assuming that the success rate for outstanding cases will be the same as for cases that have already concluded, the success rate for the sample is 35%; that is, 35% of class members will eventually win their cases.

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[8] The reason that the sample had won a somewhat higher proportion of their cases than the universe—30% versus 26%—does not appear to be a result of selection bias. Success rates for the in-period and out-period individuals were essentially the same prior to the exclusion of the additional 57 individuals who were not class members but were unknowingly included in the universe I analyzed in my original report. Every one of the 57 individuals had lost their case and most of these individuals would have otherwise qualified to be in the in-period sample.

Table 34

Outcome of Case: Methods Compared

		Won Case*	
	Total	Number	Percent
Original report	1,000	263	26%
Sample results:			
Initial (subject to censoring bias)	595	176	30%
Final (after corrections for censoring bias)	595	207	35%

* Numbers for "won" do not include those who obtained orders for voluntary departure (VD). Results in my original report indicated that an additional 46 individuals (5%) received VD orders. Sample results found an additional 28 individuals received VD orders (5%) without correction and 33 (6%) after correction for censoring bias.

My original report (at Table 17) also compared the success rate for class members against two other groups. Table 35 repeats this comparison but uses the sample results. The numbers reported in the first two columns concerning outcomes in removal proceedings for the United States as a whole, and in all removal proceedings at the Mira Loma Detention Facility are taken directly from my original report. Those in column three report sample results after correcting for censoring bias.

Table 35

Comparing Outcomes in Removal Proceedings

	United States (majority not detained)*	Mira Loma Detention Facility*	Class Members
Removal proceedings decided	608,129	9,355	595
Number won by individual**	163,907	669	207
Number relief granted	90,865	514	184
Percent won by individual	*27%*	*7%*	*35%*
Percent granted relief	*15%*	*5%*	*31%*

* Immigration Court records current as of August 31, 2012 for the period FY 2010 - 2012. According to the latest published EOIR figures, for the U.S. non-detained cases made up 58% (FY 2011) and 56% (FY 2010) of proceedings, while Mira Loma hearings are just for detainees.

** Includes cases granting relief and terminated

The general thrust of these results is not materially altered from my original report, except that class members based upon sample results are somewhat more successful. Comparing the results for the U.S. as a whole (where the majority of individuals were not detained) with those for our class members, we see that class members were more successful—35% for class members as compared with 27% for all proceedings nationally. Indeed, class members were over twice as successful—31% versus 15%—in being awarded relief.

And again, the success rate for class members as compared with all detainees at the Mira Loma Detention Facility was stark. Class members' success rate was five times higher—35% versus 7%—and the percent awarded relief was now more than six times higher—31% versus 5%.

2. *Types of Proceedings*

Use of the in-period sampling method also results in no material change to the results originally reported concerning the types of proceedings. Records available on the in-period sample showed that—as before—Immigration Court proceedings were conducted in almost every case (96%). In slightly less than one out of three cases (32%) an appeal to the Board of Immigration Appeals ("BIA") was filed. Finally, in one out of six cases (16%), an appeal was taken to the Ninth Circuit Court of Appeals.

Table 36

Court Involvement in Case: Methods Compared

		Case Appealed to:			
		BIA		9th Circuit	
	Total	Number	Percent	Number	Percent
Original report	1,000	356	36%	197	20%
Sample results:					
Initial (subject to censoring bias)	595	190	32%	97	16%
Final (after corrections for censoring bias)	595	221	37%	121	20%

Again, however, some censoring bias is likely present in our sample because some future appeals (by either the government or the class members) are not yet reflected in the data because cases have not been followed long enough. Given the sizable number of appeals to the BIA and the Ninth Circuit that are already recorded in the data and given the large number of censored cases, it is not reasonable to assume that *no* further BIA or Ninth Circuit Appeals will occur. Indeed, over a third (36%) of pending cases are still waiting for the immigration judge to issue an initial decision in their case. Thus some estimate to correct for censoring bias is needed.

Unlike the situation when we estimated sample members' success rates, it is *not* reasonable to assume that sample members whose cases have reached a conclusion are similar to those whose cases are still pending. Cases that progress more quickly through the system and thus have already reached a final outcome may not be representative of those that progress more slowly for purposes of what we are trying to estimate here—the number of cases that will be appealed.

A standard way of attempting to correct for censoring bias under these circumstances is to add in cases from prior periods which were not part of the original sample to those from the sample and calculate an overall average or proportion from this combined set. This approach, which we later explain in more detail, is sometimes referred to as the "self-balancing" method. The "self-balancing" method is appropriate under circumstances where cases originating in prior periods are subject to substantially less censoring bias, usually because they have been followed for much longer. Statisticians recognize that this approach is an approximation, but it has been found to work quite well as a practical matter in many circumstances and hence is widely used.

Using this technique, we combine information on the 348 class members not selected for the in-period sample with the 595 individuals in the sample and use this combined set to derive an overall proportion of cases that record a BIA appeal and a Ninth Circuit appeal. Not surprisingly, these results are almost identical to those in my original report, which were reported at Table 5 of that report.

3. *Relief Applications*

Use of the in-period sampling method also results in no material change to the results originally reported concerning relief applications. Results concerning relief applications for the in-period sample show that 75% of class members filed relief applications, and 29% of class members had been granted relief thus far by an immigration judge. As shown in Table 37 these percentages are similar—although slightly higher—than those from my original report.

Table 37

Applications for Relief: Methods Compared

		Relief Application:			
		Filed		Granted	
	Total	Number	Percent	Number	Percent
Original report	1,000	713	71%	251	25%
Sample results:					
Initial (subject to censoring bias)	595	444	75%	171	29%
Final (after corrections for censoring bias)	595	444	*75%	184	31%

* No correction for censoring bias needed.

Unlike with respect to outcomes and types of proceedings, the problem of censoring bias is less likely to occur in the data on relief applications because such applications tend to be filed earlier in proceedings and are thus more likely to have been recorded in the data for cases where proceedings have not yet concluded. Thus, no correction for censoring bias is made.

Censoring bias for the reasons previously discussed, however, is likely to have materially affected our estimate of the proportion of class members who are granted relief. We have already estimated the proportion of class members who won relief (31%). This

figure was reported in Table 35. We have therefore used this estimate for the proportion of class members who eventually are granted relief as shown in Table 37.

Sample results were also not materially changed for my findings on the type of relief applications filed, as well as for their grant rates. If anything, consistent with the larger proportion found to have filed relief applications and to have been granted relief when the sample method was used, these statistics when examined by application type also rose slightly. With respect to WOR/WCAT, only 19 sample members or just 3% only applied for these types of relief. This was the exact same percentage I initially reported. And again, given their relatively small numbers, the same general picture emerged if those who only sought, or were only awarded relief, under WOR or WCAT were excluded rather than included.

C. Detention Length

Among all the questions examined in my original report, the use of the in-period sampling method to measure detention length is the most impacted by bias. As Dr. Palmer noted, some sampling bias is present in the original analysis of detention lengths, because individuals detained for longer periods of time are more likely to be selected from the universe of class members detained from April 2010 to April 2011. However, censoring bias—which leads to an underestimation of detention lengths—is also present in the original report, and is magnified when we use the in-period sampling method to analyze detention lengths. This is because in-period detainees have been followed for a shorter period of time and a higher percentage of cases have not yet concluded, leaving their detention

length unknown. Data that has been publicly released by ICE as well as by the Immigration Courts to TRAC and to others indicates that some individuals remain in ICE custody for many years while waiting for a final decision in their case. Yet the data on class members on which my original report was based stopped following some class members after only 18 months.

For a measure such as detention length where the custody time can be lengthy, to obtain an uncensored data set we would have to follow all of the individuals in the sample for an extensive period of time, until they were all released from detention. Because this is often not possible, there are three approaches commonly used to correct for censoring bias in situations such as this. The first method starts with the in-period sample, but then uses an external source of data to estimate how long all members of that group will eventually be detained. The second method starts with all class members on whom we have data, but then uses a weighting method to correct for selection bias to bring the under-represented segment in the out-period group into parity with the proportion found within the in-period group. An external source of data is similarly required with the second method. However, because the out-period group was followed longer, less correction is needed. The third method is the "self-balancing" approach described above. It takes the universe of individuals observed in the time period available, and where two sources of bias are acting in opposite directions, assumes that these two sources of potential bias—selection bias and censoring bias—cancel each other out. Unlike the other two approaches, the self-balancing method does not require

any outside information or assumptions about the eventual distribution of detention length for class members. As I explain below, I ultimately concluded that the third method was the most conservative and most accurate method to measure detention lengths in this case.

Both of the first two methods require use of reliable additional data about the entire distribution of detention times that describes our population of interest. This information is then used to correct the censored data values so that the detention length used in our analysis more closely corresponds to what the actual detention times will ultimately be for those individuals who are still detained. These first two methods can be used only if reliable data describing the distribution of detention times for our population of interest exists.[9]

The first step was to locate additional data on the distribution of detention times for the population of interest so that the first two methods could be applied. Because we know that this class includes people who are detained for very lengthy periods, we must utilize an accurate source of externally-available data to approximate what the distribution of detention times looks like for class members that would include those

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[9] In his deposition, Dr. Palmer suggested that the censoring problem could be addressed by using the out-period detainees to develop estimates for the length of future detention for class members in the in-period sample that remained detained. However, the out-period data suffers from the same basic censoring problem—a significant number of out-period detainees remained detained—that would bias the data and result in an under-estimate of detention length.

with particularly lengthy times in custody. However, this presents a serious problem. Although I have actively gathered data available on ICE detentions as well as on immigration proceedings for a number of years through my work with TRAC, I know of no other data of comparable completeness and specificity to the data that was ordered disclosed through discovery in this case and that was used in my original report. To correct for the censoring bias present here, however, what is needed is comparable data for an extremely long period of time.

In an attempt to find such data I utilized detailed records on all immigration court proceedings covering the past twenty years that TRAC obtained from EOIR. I first identified all proceedings of detained individuals held at detention facilities in Los Angeles County over the last twenty years. I then eliminated from consideration any removal or deportation case where at any point custody for the individual was recorded as other than detained. From these I selected those where a decision concluding the case—that is a decision recorded as removal, voluntary departure, grant of relief, or a decision terminating the case allowing the individual to remain in the country—was recorded.

Following a method similar to the one Dr. Palmer used to avoid any selection bias, I then narrowed the set of cases to those where the decision concluding the case occurred in the same twelve month window used to compile the data used in the prior reports—April 2010 to April 2011. (I will refer to this as the "exit" data since it uses the data on when individuals' cases conclude.) Using these cases I computed the number of

days between ICE's initial filing of the action in immigration court and the date of the court's final decision in order to approximate the length of custody. Selecting only those cases where this period was at least 180 days, I then used this information in order to derive alternative estimates for the average number of days that class members remain in custody.

From the outset I had reservations as to the suitability of this exit data for the purposes needed. Because the data TRAC receives does not contain alien numbers or detainee names, I had no way to match detainee records in EOIR's data with those from ICE's data and therefore could only approximate actual time in ICE custody for each detainee. And for the same reason, it was not possible to match up detainee records through all levels of appeal. This left some uncertainty that these data accurately captured the population of interest—that is, all individuals who qualified as class members—or that I in fact was observing the *final* outcome in each case. However, I pressed forward as I determined that it was preferable to at least apply the first two methods using this exit data, given that it is the best available external data source, in order to see what the result would be using the in-period detainee data.

1. ***The First Method for Calculating Detention Length***

I then applied the first method for calculating detention lengths using our in-period sample. I did this by taking the recorded times for the individuals who were still detained with pending cases, comparing them with the times I computed for the identical proportion of individuals from the exit data, and then correcting the

recorded times to reflect how long the exit data indicated we should expect them to remain detained. I then computed the average detention length for detainees in the in-period sample. This resulted in an estimate for the average detention period for class members of 474 days. Since this result was substantially larger than the value I had derived in my original report (404 days), this increased my doubts as to the feasibility of obtaining reliable results using the first method.

2. *The Second Method for Calculating Detention Length*

I then applied the second method of calculating detention lengths. The second method utilizes a different approach for correcting for selection bias. It uses the entire population of 943 class members, rather than only those selected for the in-period sample, and then uses a weighting method to correct for selection bias to bring the under-represented segment in the out-period group into parity with the proportion found within the in-period group. This "weighted sample" thus corrects for selection bias, but does not require throwing away data on any class members.

Under many circumstances this *weighted sample* method gives better precision and hence is often preferred by statisticians over the first method, particularly because it does not require disregarding data on any class members (as the first method does). Because those not selected for the in-period sample had been followed longer, censoring bias on detention time also was significantly less. Thus, relatively speaking, the weighted combined sample needed less correction for censoring bias.

I then computed the average detention length using the second method, by correcting censored times in the weighted sample to reflect how long the exit data indicated we should expect those still detained to remain detained. This resulted in an estimate for the average detention period for class members of 478 days. This result again was much larger than the value of 404 days I had derived as the average detention days for class members in my original report, and further undermined my confidence in the use of any method that required an external source of data.

Based upon these results, I concluded that it was infeasible to derive reliable estimates for detention lengths for class members using either of the first two methods. These methods required more reliable information about population detention times than was provided by available data.

3. *The Third Method for Calculating Detention Length*

The third method I used was the self-balancing approach to correct for both selection and censoring bias. I started with the same data on detention time for the 1,000 detainees I had used in my original report. As we have discussed, there are two primary sources of known bias.[10] The effect of censoring bias is to make

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[10] There is also a third source—the inclusion of 57 detainees who were not class members. Because their cases completed before the 180 detention days were reached, their detention times were also shorter than average. Thus, their inclusion depressed the average detention time for the class. It often happens in studies that the determination of membership in the population of interest inadvertently includes some individuals who should have been excluded, or excludes some individuals that should have been

estimates of detention times too short, while selection bias leads to the opposite effect—making estimates of detention times too long. If these two biases are approximately the same magnitude, they cancel each other out, and resulting estimates of detention time would be correct. This method turns out to be the equivalent of what I employed when I was simply analyzing the universe of detainees in my original report, using all of the data available and making no predictive assumptions about how long people would be detained for in the future. Thus, the estimates that result from the self-balancing approach are identical to the ones that were reported there.

While we cannot know in advance if the result retains some "net" bias in one direction or the other, use of the self-balancing method allows us to avoid making further assumptions about the nature of the sample and imposing adjustments to correct for resulting biases. In this sense it has the advantage of being based on what we know has occurred, rather than on what *might* occur.

Self-balancing is the standard method used by statisticians to correct for censoring bias in the absence of adequate data to estimate and correct for it. Adding in cases from prior periods which were not part of the original sample and calculating an overall average from this combined set will generally result in better estimates than selecting a perfectly random sample

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included because of imperfect information. The self-balancing approach treats these imperfections as simply other potential sources of bias that the method balances out. In contrast, the in-period and weighted sampling methods assume that we can identify the population of interest precisely.

where there is censoring bias. This approach works because cases originating in prior periods usually have been followed longer and thus either have no censoring bias or (as in this case) are subject to less censoring bias. Thus, we know that it generally will lead to better estimates to use this self-balancing approach than to use a sample that is chosen to avoid selection bias but fails to account for censoring bias.

Of course statisticians recognize that this approach is an approximation, but it has been found to work quite well as a practical matter in many circumstances and hence is widely used. In my professional judgment, given the state of available data, the estimates produces by this method are the most reliable we have. This method, which is described as a self-balancing estimation technique when conducting sampling, is exactly equivalent to the analysis in my original report. Hence the results I reported there are the most reliable we have on the average detention length for all individuals who qualify or will qualify as class members in the future—our population of interest.

Appendix: Sample Results for Section 236(c) and Section 235 Subclasses

Using the same in-period sampling approach for subclasses resulted in a total of 252 individuals in the Section 236(c) Subclass sample, and 55 in the Section 235 Subclass sample. Table 38 compares how many won their cases, and estimates—both prior to correction and after corrections for censoring bias—their win rates. As we saw for the population as a whole, the in-period sampling method resulted in somewhat higher success rates than originally reported.

Table 38

Outcome of Case: Methods Compared for Subclasses

	Total	Won Case* Number	Won Case* Percent
Section 236(c) Subclass			
Original report	460	150	33%
Sample results:			
Initial (subject to censoring bias)	252	88	35%
Final (after corrections for censoring bias)	252	97	38%
Section 235 Subclass			
Original report	68	41	60%
Sample results:			
Initial (subject to censoring bias)	55	35	64%
Final (after corrections for censoring bias)	55	36	65%

* Numbers for "won" do not include those who obtained orders for voluntary departure (VD). For the Section 236 Subclass an additional 1% of individuals won VD orders under either method. There were no VD orders in the Section 235a Subclass.

Expert Statistical Report of Dr. Chester I. Palmer

Alejandro Rodriguez et. al. v. Timothy S. Robbins, et al.

Civil Action No. CV 07-3239-TJH (RNBx)
Central District of California, Western Division

Oct. 12, 2012

Executive Summary

Statistical analyses were performed on data for aliens detained in the Central District of California for at least 180 days without an individualized bond hearing before an immigration judge as of some date in the period from April 21, 2010 through April 21, 2011. In order to provide an appropriate sample, the analyses were restricted to aliens who reached their 181st day of custody in that time period.

- Based on the reasons coded in the data, most adjournments requested by the aliens were for a relatively small number of different reasons. Five reasons (time for preparation, time to seek representation, time to file another application, time requested by the alien or the alien's representative, and time to file for asylum) accounted for about 84% of the adjournments requested by the aliens.

Analyses of adjournments requested by the aliens showed:

- 86.9% of the aliens requested at least one adjournment, and over half of them requested three or more. Only 13.1% of the aliens never requested an adjournment.

- For those aliens requesting at least one adjournment, the total resulting delay varied from 5 days to 562 days; the median was 121 days and the mean (average) was 136.3 days.
- In addition to the 13.1% of aliens who did not request an adjournment, another 5.6% requested adjournments that totaled 30 days or less; 22.7% requested adjournments totaling 181 days or more.

Analyses of adjournments requested by the aliens during just their first 180 days of custody showed:

- 84.7% of the aliens requested at least one adjournment, and 66.2% requested two or more Only 15.3% of the aliens did not request at least one adjournment during their first 180 days of custody.
- For those aliens requesting at least one adjournment during their first 180 days of custody, the total resulting delay varied from 6 days to 269 days; the median was 101 days and the mean (average) was 105.9 days.
- In addition to the 15.3% of aliens who did not request at least one adjournment during their first 180 days of custody, another 6.0% requested adjournments that totaled 30 days or less; 34.1% requested adjournments totaling 121 days or more.

Introduction

This report presents statistical analyses of events during the periods of custody of aliens who had been detained by U.S. Immigration and Customs Enforce-

ment without an individualized bond hearing before an immigration judge for at least 180 days or more as of some date in the period from April 21, 2010 through April 21, 2011 and, as of some date within that period, were being held in facilities in the Central District of California. The report was prepared at the request of the attorneys for defendant in the litigation *Alejandro Rodriguez et. al. v. Timothy S. Robbins, et al.*, Civil Action No. CV 07-3239-TJH (RNBx), filed in the Central District of California, Western Division.

The information for the analyses in this report came was supplied by counsel for defendant. More specifically, the report is based on the following information:

- An Excel spreadsheet named "AC Delays.xls" received on 09/27/2012. This was an update of an earlier spreadsheet of the same name received on 09/25/2012 with a small number of additional rows. These spreadsheets contained information on the dates that the aliens entered custody and left custody and the dates of hearings, with codes indicating whether each hearing was adjourned and, if so, whether the adjournment was requested by the alien. This is the primary information used in the analyses in this report.
- An Excel spreadsheet named "dbo_tblAdjournmentCodes.xlsx" received on 09/25/2012 that was used only to obtain descriptive labels for the codes for adjournment reasons in the AC Delays" spreadsheets.
- An Excel spreadsheet named "Rodriguez Update 09-26-12.xlsx" received on 09/27/2012 that

was used only to find end dates of custody for 27 individuals for whom those dates were missing from the "AC Delays" spreadsheets.

- An Excel spreadsheet named "Detention Stays in LOS AOR.XLSX" that was received on 10/02/2012 and that was used only to check that no aliens were inadvertently omitted from the "AC Delays" worksheet. No information from this spreadsheet was used in the analyses described in this report.
- Four e-mails from Sarah Wilson: two dated 10/01/2012, one dated 10/03/2012, and one dated 10/10/2012. These messages were used to provide start and/or end dates of custody for about 15 individuals and to identify a few individuals to be excluded from the analyses.

I also had several discussions with attorneys for defendant and data custodians to ensure that I understood the various data sets, but those discussions did not supply any information used in the analyses.

This report was prepared by Dr. Chester Palmer, Senior Statistician, ERS Group. Dr. Palmer joined ERS Group in 1998 after twenty-four years as a faculty member in the Department of Mathematics at Auburn University, Montgomery, Alabama, where he taught a variety of courses in mathematics and statistics. Dr. Palmer has testified as an expert witness in statistics at deposition and/or at hearing in 19 cases in various federal district courts, at one arbitration, and at one administrative proceeding. Dr. Palmer's vita, including a list of testimony, forms Appendix A to this report.

I. Issues in the Analyses

A. Determining a Proper Sample

It is my understanding that aliens were included in the data set if they had been detained by U.S. Immigration and Customs Enforcement without an individualized bond hearing before an immigration judge for at least 180 days or more as of some date in the period from April 21, 2010 through April 21, 2011 and, as of some date within that period, were being held in facilities in the Central District of California. This method of selection raises some statistical issues.

To see why, consider a simpler example. Consider a hospital that wants to draw a sample of patient stays. Suppose that, for the time period of interest, 25 patients each spent 1 day in the hospital and 1 patient, Mr. Long, spent 30 days in the hospital. There are several ways in which the hospital might draw a sample for analysis.

- Individual-Based: An individual-based sample might proceed from the fact that the hospital had 26 patients, and randomly sample among them. Each patient has the same probability of inclusion in this sample.
- Day-Based: Alternatively, the hospital might select one day and sample those patients. In this case, because Mr. Long spent 30 days in the hospital and each other patient spent only one day, Mr. Long is much more likely to be included in the sample than any of the other patients.

A sample is called "biased" (a technical term in statistics) if not all cases of interest have the same proba-

bility of selection for the sample. In the example above, the day-based sample is a biased sample of individuals because individuals with longer stays are more likely to be selected than other individuals. In the statistical language, patients with long stays are overrepresented If the hospital uses the day-based sample for a survey of patient satisfaction, there will likely be too many patients with long stays (and presumably more serious conditions) in the sample, and their opinions will count more than the opinions of patients with shorter stays. If the typical level of satisfaction for patients with long stays is different from that of patients with shorter stays, the results of the analysis could be quite deceptive.

On the other hand, there are some purposes for which the day-based sample would be better. If the hospital wants to analyze its daily workload, the day-based sample is appropriate because Mr. Long really did make up a higher proportion of the workload than did any of the other patients.

To see the similar issue with the data set for this litigation, consider two hypothetical aliens, Mr. Short and Mr. Long, who entered custody on the same day, April 21, 2009. Mr. Short was detained for 7 months prior to his hearing, then released immediately after his hearing in November 2009. Thus, he is a class member, but he is not included in the data set because he was not in custody during the time period for the data (April 21, 2010 through April 21, 2011). Mr. Long was detained for 13 months prior to his hearing, then released immediately after his hearing in May 2010. Thus, he is a class member and he is included in the data set because he was in custody during the

time period for the data. In summary, the method of selection for the data set is biased in favor of including aliens with longer periods of custody rather than those with shorter ones.

This bias may or may not matter depending on the analyses to be performed. For example, if one analyzes what happened during the first 180 days each alien was in custody, the bias probably does not matter (unless there was some change in procedure over time). On the other hand, if one analyzes how long people were held in custody, or performs any other analysis that looks at lengths of time, the bias may have a substantial effect because aliens with longer periods of custody are overrepresented.

The simplest way to avoid such a bias and create an individual-based sample is to assign to each individual a single date and then use that date to determine whom to include. In the hospital example, one might sample based on the first day each person was in the hospital, or the last day; either would give Mr. Long the same probability of selection as the other patients. For this litigation, the most straightforward way to sample from the data set is to take those aliens in the data set for whom the 181st day of detention fell in the time period for the data (April 21, 2010 through April 21, 2011). That has the advantage that, if one believes that 181 days from the beginning of custody is an especially important date, one has everyone for whom that date falls in the time period for the sample. I have followed that practice, and in the body of this report I give results for only those aliens; I refer to them as "in-period". It would be reasonable for the reader to wonder how much of a difference that makes

(in fact, not much for most of my analyses), so I have included parallel tables without that restriction in Appendix B.

B. Details of the Analyses and Data Issues

Analyses were conducted based on alien number as provided in the data sets.

The following records were not used in the analyses:

- There are six alien numbers that are accompanied by names that make it appear that the records may not all pertain to the same individual: 022660128, 036901593, 076186391, 077052958, 077324537, and 095425585. These six alien numbers have been excluded from the analyses.
- There are two alien numbers for which the calculated stay in custody is less than 180 days: 090503375 and 093166641. These two alien numbers have been excluded from the analyses.
- There are three alien numbers for which there are confidentiality issues under the protective order in this case. These three alien numbers have been excluded from the analyses.
- For some aliens, the data sets contain information relating to events that occurred before or after the period of custody that resulted in the alien being included in the data set; for example, events relating to prior proceedings. Any records from before the beginning of the relevant period of custody (the variable name in the data set is "Entered Custody") or on or af-

ter the end of that period ("Book Out") are not used in the analyses.

- Records with adjournment reason '99', defined in the documentation as "Data Entry Error," are not used in the analyses. It is my understanding that no hearings actually occurred on those dates.

The following conventions were used in the analyses:

- The delay due to an adjournment is calculated as the number of days until the next hearing date or, if the alien leaves custody before the next hearing date, the number of days until the alien leaves custody.
- Records with no reason for the adjournment are treated as hearing dates but are not considered as adjournments requested by the alien. Many of these records are for events before the time period of interest; about 70% are before 2008, including about 56% from before 2004. Others apparently represent hearings that, at the time the data were collected, were in the future; about 18% were in October 2012 or later.
- It is my understanding that adjournment code '8A', defined as 'IJ Completion prior to hearing', does not represent a hearing but is likely to represent some kind of change in the status of the alien. Those actions are also counted as hearing dates but are not considered as requested by the alien, so they do not affect counts of adjournments requested by the aliens. They do terminate delays of previous adjourn-

ments, so they may shorten, but not lengthen, those delays.

In some cases, there are multiple records in the data set for the same alien number and date. These situations were treated as follows:

- If there are multiple records with the same adjournment reason, they are treated as duplicates and all but one of them are deleted.
- In counts of adjournments, multiple adjournments on the same date are counted as a single adjournment, although there may be multiple reasons counted for that adjournment.
- If there are multiple reasons for adjournment on the same date, if any of the reasons indicates an adjournment at the request of the alien, that adjournment is counted as being at the request of the alien.

After my initial review of the data, I requested some additional information. To put the numbers here in context, the original data set contained 10,283 records (i.e., dates of adjournments) for 1,021 distinct alien numbers; 4,874 records showed delays requested by the alien. I received the following additional information as discussed in the Introduction above:

- An updated list of adjournments including 124 additional records, 59 of which were delays requested by the alien.
- There were 13 alien numbers in the original data for which the dates the alien entered custody and left custody were both missing. I received information on the dates all 13 entered custody

and the dates on which 12 of them left custody. (The thirteenth was still in custody.)

- There was one alien number for which the original data showed the date for leaving custody as prior to the date for entering custody. I received a corrected date for leaving custody.
- A file that provided the dates when 27 aliens left custody when those dates had been missing in the original data.

The additional data had little effect on the results of the analyses. The additional information on adjournments added just over 1% to the original number. The dates for entering custody allowed 10 additional aliens to be included in the analyses. (Three of the 13 were not used for reasons discussed above.) The dates for leaving custody had little effect on the analyses as those dates play a very minor part in the analyses.

II. Results of Analyses

A. Types of Adjournments at the Request of the Alien and Lengths of the Resulting Delays

Table 1 below gives information about the number of adjournments for each of the reasons labeled in the data base as requested by the in-period aliens and the average resulting delay in days.

Table 1: Types of Requested Adjournments and Average Resulting Delays			
Code	Description	Number	Mean Delay
[illegible]	PREPARATION--ALIEN ATTORNEY REPRESENTATIVE	594	37.4
01	ALIEN TO SEEK REPRESENTATION	382	42.6
06	ALIEN TO FILE OTHER APPLICATION	319	42.8
12	OTHER ALIEN ALIEN'S ATTY REPRESENTATIVE REQUEST	284	39.8
[illegible]	ALIEN TO FILE FOR ASYLUM	184	34.0
22	SUPPLEMENT ASYLUM APPLICATION	81	49.1
7C	I-130 PENDING	74	41.6
13	OTHER NO-SHOW BY ALIEN ALIEN'S ATTORNEY OR REP	58	29.0
39	RECORDS CHECK FINGERPRINTS OVERSEAS INVESTIGATION	[illegible]	37.7
7A	ALIEN APPLICATION PROCESS	19	51.6
[illegible]	ALIEN OR REP REJECTED EARLIEST POSSIBLE HEARING	14	73.9
21	CONTESTED CHARGES	13	65.4
23	ASYLUM APPLICATION WITHDRAWN RESET FOR OTHER ISSUE	[illegible]	53.0
09	ALIEN CLAIM TO U.S. CITIZENSHIP	4	47.3
[illegible]	ILLNESS OF ATTY REP	[illegible]	[illegible]
38	ILLNESS OF ALIEN	1	[illegible]
40	ILLNESS OF WITNESS	1	51.0
7D	I-140 PENDING	1	7.0
7E	I-730 PENDING	1	53.0
OT	ALIEN ATTORNEY REP TO FILE OTHER APPLICATION	1	42.0
All		1982	

Table 1 indicates that most of the delays labeled in the data base as requested by the alien are for one or more of a relatively small number of reasons. The top five reasons account for about 84% of the delays and the top nine reasons account for about 97%. The average delay is about 40 days, and does not vary much among the most common reasons for the request.

Table B-1 in Appendix B contains similar information including out-of-period aliens.

B. Counts of Requested Adjournments by Alien

Table 2 below shows the number of adjournments requested by in-period aliens.

Table 2: Number of Adjournments Requested		
Number of Requests	Number of Aliens	Pct of Aliens
None	87	13.1
1	92	13.9
2	125	18.9
3	113	17.1
4	104	15.7
5	62	9.4
6	43	6.5
7	17	2.6
8	6	0.9
9	4	0.6
10 or more	9	1.4
Total	662	100.0

Table 2 shows that only 13.1% of the in-period aliens never requested an adjournment. From an alternative point of view, 86.9% of them requested at least one adjournment, and over half of them requested three or more.

Table B-2 in Appendix B contains similar information including out-of-period aliens.

C. Counts of Adjournments Requested in the First 180 Days of Custody

Table 3 below show the number of adjournments requested by in-period aliens where the count includes only those requested in the first 180 days of custody.

Table 3: Number of Adjournments Requested in First 180 Days of Custody		
Number of Requests	Number of Aliens	Pct of Aliens
None	101	15.3
1	123	18.6
2	151	22.8
3	165	24.9
4	88	13.3
5	27	4.1
6	5	0.8
7	2	0.3
Total	662	100.0

Table 3 shows that only 15.3% of in-period aliens did not request at least one adjournment during their first 180 days of custody; 84.7% did request at least one, and 66.2% requested two or more. Recall that the average delay resulting from a requested adjournment was about 40 days. Few aliens requested more than 4 adjournments within their first 180 days

of custody; in most cases, there probably was just not enough time to request more.

Table B-3 in Appendix B contains similar information including out-of-period aliens.

D. Total Delays for Adjournments Requested by Aliens

Table 4 below provides summary information by alien on the total delays resulting from the adjournments requested by the in-period aliens. Note that this table does not include the 87 in-period aliens that did not request an adjournment. (See Table 2.)

Table 4: Summary Statistics on Total Delays for Adjournments Requested by Aliens	
Number of aliens	575
Shortest delay	5 days
Median delay	121 days
Mean delay	136.3 days
Longest delay	562 days

Table B-4 in Appendix B contains similar information including out-of-period aliens.

Table 5 below shows the distribution of the total length of the delays requested by in-period aliens.

Table 5: Distribution of Total Delays for Adjournments Requested by Aliens		
Length	Number of Aliens	Pct of Aliens
None	87	13.1
1 to 30 days	37	5.6
31 to 60 days	78	11.8
61 to 90 days	86	13.0
91 to 120 days	80	12.1
121 to 150 days	81	12.2
151 to 180 days	63	9.5
181 days or more	150	22.7
Total	662	100.0

The table shows that there was quite a bit of variation between different in-period aliens in the length of the delay resulting from adjournments that they requested. In addition to the 87 aliens who did not request an adjournment, another 37 requested adjournments that totaled 30 days or less. At the other end of the scale, 150 requested adjournments totaling 181 days or more.

Table B-5 in Appendix B contains similar information including out-of-period aliens.

E. Total Delays for Adjournments Requested by Aliens During the First 180 Days of Custody

This section contains the results of analyses parallel to those in Section D immediately above but only for

those delays that in-period aliens requested during the first 180 days of custody. Note that it is possible for an adjournment requested during the first 180 days to continue beyond the 180-day mark, and the full length of the adjournment is included in the analyses.

Table 6 below provides summary information on the resulting delays. Note that this table does not include the 101 in-period aliens that did not request an adjournment. (See Table 3.)

Table 6: Summary Statistics on Total Delays for Adjournments Requested by Aliens in Their First 180 Days of Custody	
Number of aliens	561
Shortest delay	6 days
Median delay	101 days
Mean delay	105.9 days
Longest delay	269 days

Table B-6 in Appendix B contains similar information including out-of-period aliens.

Table 7 below shows the distribution of the total length of the delays requested by in-period aliens.

Table 7: Distribution of Total Delays for Adjournments Requested by Aliens in First 180 Days of Custody		
Length	Number of Aliens	Pct of Aliens
None	101	15.3
1 to 30 days	40	6.0
31 to 60 days	91	13.7
61 to 90 days	100	15.1
91 to 120 days	104	15.7
121 to 150 days	103	15.6
151 to 180 days	76	11.5
181 days or more	47	7.1
Total	662	100.0

Even after restricting to adjournments requested during the first 180 days of custody, there was quite a bit of variation between different in-period aliens in the length of the delay resulting from adjournments that they requested. In addition to the 101 aliens who did not request an adjournment, another 40 requested adjournments that totaled 30 days or less. At the other end of the scale, 226 (34.1%) requested adjournments totaling 121 days or more.

Table B-7 in Appendix B contains similar information including out-of-period aliens.

III. Statement of Compensation and Signature

The author of this report is employed by ERS Group, which currently bills his time at $475 per hour.

[Oct. 12, 2012]
Date

/s/ CHESTER I. PALMER
CHESTER I. PALMER

* * * * *

Appendix B

Tables Parallel to Those in the Text but Including Out-of-Period Aliens

Table B-1: Types of Requested Adjournments and Average Resulting Delays

	All		In-period			
			No		Yes	
		wait		wait		wait
	N	Mean	N	Mean	N	Mean
Code and Description						
01 ALIEN TO FILE REPRESENTATION	774	44.2	331	45.3	382	42.8
02 PREPARATION--ALIEN/ATTORNEY/REPRESENTATIVE	862	39.5	357	45.4	504	37.4
03 ALIEN TO FILE FOR ASYLUM	255	36.1	75	48.2	184	34.0
04 ALIEN TO FILE OTHER APPLICATION	552	45.6	233	48.1	319	42.8
11 OTHER NO-SHOW BY ALIEN/ALIEN'S ATTORNEY OR REP.	104	32.0	46	35.5	58	25.5
12 OTHER ALIEN/ALIEN'S ATTY/REPRESENTATIVE REQUEST	551	42.7	32	45.4	234	35.8
21 SUPPLEMENT ASYLUM APPLICATION	114	42.1	33	47.2	81	40.1
22 ALIEN OR REP. REQUESTED EARLIEST POSSIBLE HEARING	16	73.9	2	75.0	14	73.8
23 ASYLUM APPLICATION WITHDRAWN/REFER FOR OTHER ISSUE	9	75.3	4	113.5	5	53.3
24 RECORDS CHECK/FINGERPRINTS/OVERSEAS INVESTIGATION	69	50.4	35	62.6	31	37.7
25 ILLNESS OF ALIEN	9	43.2	3	47.9	1	7.3
30 ILLNESS OF ATTORNEY	7	59.2	5	67.4	2	35.2
40 ILLNESS OF WITNESS	1	51.0	0	0	1	51.0
51 CONFERENCE CHANGES	21	45.3	5	43.4	13	45.5
52 JURISDICTION MEETS WITH THE EIR	1	155.0	1	155.0	0	0
58 Alien Claim to U.S. Citizenship	10	32.0	6	43.5	4	17.3
7A ALIEN APPLICATION PROCESS	23	56.9	4	47.0	19	51.6
7C I-130 PENDING	179	44.5	104	53.3	74	42.0
7D I-140 PENDING	1	7.0	0	0	1	7.0
7E I-730 PENDING	1	53.0	0	0	1	53.0
7H PENDING NATURALIZATION OF PETITIONING RELATIVE	1	45.0	1	45.0	0	0
7J ALIEN/ATTORNEY/REP. TO FILE OTHER APPLICATION	1	42.0	0	0	1	42.0
ALL	3618	42.9	1921	46.4	1352	35.7

Table B-2: Number of Adjournments Requested

	All		in_period			
			No		Yes	
	N	Pct	N	Pct	N	Pct
All	1013	100.0	349	100.0	664	100.0
Count						
0	113	11.2	26	7.5	87	13.1
1	119	11.7	27	7.7	92	13.9
2	156	15.4	31	8.9	125	18.8
3	166	16.4	53	15.2	113	17.0
4	142	14.0	33	9.5	109	16.4
5	115	11.4	53	15.2	62	9.3
6	83	8.2	43	12.3	40	6.0
7	55	5.4	38	10.9	17	2.6
8	19	1.9	12	3.4	7	1.1
9	13	1.3	5	1.4	8	1.2
10	9	0.9	5	1.4	4	0.6
11	9	0.9	6	1.7	3	0.5
12	4	0.4	3	0.9	1	0.2
13	1	0.1	1	0.3	0	0.0
14	3	0.3	3	0.9	0	0.0
15	1	0.1	1	0.3	0	0.0
19	1	0.1	0	0.0	1	0.2
22	1	0.1	1	0.3	0	0.0
23	1	0.1	1	0.3	0	0.0

Table B-3: Number of Adjournments Requested in First 180 Days of Custody

		in_period			
	All	No		Yes	
	N	Pct	N	Pct	N	Pct
All	1010	100.0	348	100.0	662	100.0
Count						
0	140	13.9	39	11.2	101	15.3
1	159	15.7	36	10.3	123	18.6
2	223	22.1	72	20.7	151	22.8
3	274	27.1	109	31.3	165	24.9
4	161	15.9	73	21.0	88	13.3
5	42	4.2	15	4.3	27	4.1
6	5	0.5	4	1.1	1	0.2
7	3	0.3	1	0.3	2	0.3

Table B-4: Summary Statistics on Total Delays for Adjournments Requested by Aliens

		in_period		
		All	No	Yes
Total Delay	N	897	322	575
	Min	5.0	6.0	5.0
	Median	148.0	221.0	121.0
	Mean	171.2	233.7	136.3
	Max	556.0	556.0	362.0

Table B-5: Distribution of Total Delays for Adjournments Requested by Aliens

	All		in period			
			No		Yes	
	N	Pct	N	Pct	N	Pct
All	1013	100.0	345	100.0	668	100.0
Total Delay						
None	113	11.2	26	7.5	87	13.0
1 to 30 days	49	4.9	12	3.4	37	5.5
31 to 60 days	92	9.1	14	4.0	78	11.7
61 to 90 days	99	9.8	13	3.7	86	13.0
91 to 120 days	107	10.6	27	7.8	80	12.0
121 to 150 days	113	11.2	32	9.2	81	12.2
151 to 180 days	54	5.3	31	8.9	23	3.5
181 days or more	343	34.0	193	55.9	150	22.7

Table B-6: Summary Statistics on Total Delays for Adjournments Requested by Aliens During First 180 Days of Custody

		All	in period	
			No	Yes
Total Delay	N	970	305	561
	Min	2.0	2.0	6.0
	Median	119.0	145.0	101.0
	Mean	116.3	135.3	105.9
	Max	269.0	239.0	269.0

Table B-7: Distribution of Total Delays for Adjournments Requested by Aliens During First 180 Days of Custody

	All		in period			
			No		Yes	
	N	Pct	N	Pct	N	Pct
All	1013	100.0	348	100.0	665	100.0
Total Delay						
None	143	13.9	39	11.2	102	15.3
1 to 30 days	52	5.1	12	3.4	40	6.0
31 to 60 days	115	11.4	24	6.9	91	13.7
61 to 90 days	133	13.1	30	8.6	100	15.1
91 to 120 days	146	14.5	42	12.1	104	15.7
121 to 150 days	169	16.6	65	18.7	103	15.5
151 to 180 days	143	14.1	67	19.3	76	11.5
181 days or more	116	11.5	69	19.8	47	7.1

Rebuttal Expert Statistical Report of
Dr. Chester I. Palmer

Alejandro Rodriguez et. al. v. Timothy S. Robbins, et al.
Civil Action No. CV 07-3239-TJH (RNBx)
Central District of California, Western Division

Dec. 14, 2012

Introduction

This report presents statistical analyses of events during the periods of custody of aliens who had been detained by U.S. Immigration and Customs Enforcement without an individualized bond hearing before an immigration judge for at least 180 days or more as of some date in the period from April 21, 2010, through April 21, 2011, and, as of some date within that period, were being held in facilities in the Central District of California. The report was prepared at the request of the attorneys for respondents in the litigation Alejandro Rodriguez et. al. v. Timothy S. Robbins, et al., Civil Action No. CV 07-3239-TJH (RNBx), filed in the Central District of California, Western Division.

I prepared an earlier report in this case dated October 12, 2012. My vita forms Appendix A to that report. The case list in that vita is still correct except that I have also testified by deposition in this matter. My earlier report lists on page 3 the data sources I used in my analyses. The analyses in this report use the same data sources plus a data file supplied by in discovery by Dr. Susan Long, petitioners' expert.

This report has three main purposes:

- As I discussed in my original report, the data sets produced by respondents for use in this litigation overrepresent class members with longer periods of detention. For my original report, I analyzed a subset of the data (what I called the "in-period" aliens) that corrected for this overrepresentation. As I commented then, correcting the overrepresentation generally had little effect on my results because of the types of analyses I performed. Dr. Long's report often analyzed lengths of detention, so correcting the overrepresentation has a substantial effect on many of those results, and it also has some effect on some of her other results. Thus, one purpose of this report is to show that extent of those effects and provide parallel values based on only the in-period aliens.
- Most of Dr. Long's analyses of lengths of detention tabulate only the mean number of days in detention for various groups. I think it is desirable to present additional information regarding the distribution of the lengths of detention, and I have done so in this report.
- I have also provided some information that puts the information on lengths of detention in the context of the results in my original report regarding delays requested by the aliens.

I. Selecting an Appropriate Sample for Analysis

In my previous report, I discussed at some length the choice of an appropriate sample for analysis in this litigation. I will include a brief summary of that discussion below, together with some additional consider-

ations; but I have also included my earlier discussion as Appendix A to this report.

According to the Third Amended Complaint:

> 105. Petitioners represent a class of all people within the Central District of California who 1) are or will be detained for longer than six months pursuant to the general immigration detention statutes pending completion of removal proceedings, including judicial review, 2) are not detained pursuant to one of the national security detention statutes at 8 U.S.C. 1226a and 8 U.S.C. 1531-37 and 3) have not been afforded a hearing to determine whether their prolonged detention is justified.
>
> 106. The class includes people who were present in an ICE detention facility in the Central District on or after the date on which the original complaint was filed . . .

The original complaint was filed on May 16, 2007, so the class time period extends from that date onward. On the other hand, it is my understanding that aliens were included in the data set produced in discovery and used in Dr. Long's expert report if they had been detained by U.S. Immigration and Customs Enforcement without an individualized bond hearing before an immigration judge for at least 180 days or more as of some date in the period from April 21, 2010 through April 21, 2011 and, as of some date within that period, were being held in facilities in the Central District of California. Thus, only a small proportion of the class

is included in the data set[1] and the data set itself is already a sample of the potentially relevant data. Unfortunately, the data set is not a representative sample of the class because it was selected in a way that makes inclusion of class members with long detention periods more likely than the inclusion of otherwise similar class members with shorter detention periods. To see that, note that aliens whose detention began early in the time period, say in 2007, are included in the sample only if they were still in detention on April 21, 2010; the data set does not include otherwise similar aliens who began their detention at the same time and were detained for at least six months, making them class members, but who were detained for less than two years and so were no longer in detention on April 12, 2010. For this reason, my earlier report emphasized analyses on those class members for whom the 181st day of detention fell in the time period for the data (April 21, 2010 through April 21, 2011). I refer to these class members as "in-period aliens."[2] Note that another way of describing this is to say that these aliens entered custody within the time period from October 23, 2009 (180 days before April 21, 2010) through October 23, 2010 (180 days

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[1] The period of one year represented in the data is only about 18% of the period from May 16, 2007 to the date of this report; and because the class includes future detainees, that proportion decreases daily.

[2] My earlier report also contains an appendix with tables for out-of-period aliens and for all aliens in the data set, in-period and out-of-period combined, so the reader can see the extent to which the choice of in-period aliens for analysis affects the results of the analyses.

before April 21, 2011). Because the set of in-period aliens contains all class members whose detention began during a specified period of time, it does not have the problem of overrepresenting aliens with longer detention periods. For a more detailed discussion, see Appendix A.

II. Comparing Analysis Results with Those in Dr. Long's Report

A. General Considerations

As discussed in the Introduction, one major purpose of this report is to provide results parallel to those provided in Dr. Long's report but that correct for the overrepresentation of class member with longer periods of detention as discussed in Section I above. In order to do so, I reproduce Tables 1 to 16 in her report using the data set that she supplied in discovery; I number those tables prefix "L-" to indicate that I used Dr. Long's data.[3] One major difference is that because of my opinion that it is more appropriate to perform analyses on the in-period aliens, as defined above, I provide information for each table separately for in-period aliens, for out-of-period aliens, and for all aliens in the data set. Dr. Long performed her analyses only for all aliens.[4]

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[3] Although Dr. Long and I performed our analyses on different data sets, the differences between the two data sets make little difference to the results. See Appendix B for additional information on this point, and also for a discussion of the reliability of the data set used in my analyses.

[4] With the exception of one trivial typographical error, I am able to verify the numbers in her report. In her Table 12, under "All

The second general difference between the tables in this report and those in Dr. Long's report applies only to those tables that show lengths of detention: Tables 2, 6, 11, 12, 15, and 16. She does not always supply the same information in such tables. In Table 2, she provides averages, lowest values, and highest values. In Tables 6, 11, 12 and 16, she supplies only the averages; in Table 15, she supplies the averages and the highest values. Her Table 3 supplies additional information about the distribution of detention times in Table 2, but the report does not supply such information for her other tables of lengths of detention. As discussed in the Introduction, I believe that it is desirable to present additional information regarding the distribution of the lengths of detention rather than just the mean, or mean, minimum, and maximum. Thus, all my tables of detention length supply the same information:

N	the number of cases in the row
Pct	the percentage of total cases in the table that are in this row
Mean	the mean (average) length of detention for cases in this row
Min	the shortest length of detention for cases in this row
P10	the 10th percentile length of detention for cases in this row (i.e., 10% were below this value, 90% were above it)

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cases" and "Applied for Relief" equal to "No," the number should be 360, not 362. Compare with her Table 11 above it.

P25 the 25th percentile length of detention for cases in this row

Median the central value, also called the 50h percentile; half of the lengths for cases in this row were below this value, half were above it.

P75 the 75th percentile length of detention for cases in this row

P90 the 90th percentile length of detention for cases in this row

Max the highest length of detention for cases in this row

B. An Example Comparing the Two Types of Tables

On the next page, I have reproduced Table 2 from Dr. Long's report and Table L-2 from Appendix C of this report for comparison. In this section, I compare and contrast the two sets of results and discuss the differences in interpretation.

Note that my table L-2 has three sections, one for "in_period No" (the out-of-period aliens), one for "in_period Yes" (the in-period aliens), and one for "All" (the complete data set). Many of my tables use this format, although some simpler tables place the three sets of results side by side.

As discussed above, the results in Dr. Long's Table 2 correspond to the "All" section of my table L-2. Thus, Dr. Long's average detention times of 381, 805, and 404

(days) appear in my table in the Mean column for the "All" section at the bottom. Similarly, her "Lowest" values appear in my Min column and her "Highest" values appear in my Max column. Thus, as noted earlier, when we calculate the same statistics, we get the same answer. Looking at the bottom section of my printout, the mean overall is 404 days (bottom row) and the median is 342 days. There is nothing wrong with giving the mean, but it would be an easy mistake for the reader to believe that half the values were below the mean of 404 days and half above it. In fact, the dividing line between the bottom half and the upper half is at the median of 342 days, about two months less than the mean; there are more values below the mean of 404 days than there are above it. The difference between the median and the mean is quite substantial; from 342 days to 404 days is an 18% increase. This difference is caused by the shape of the distribution of the lengths of detention. With a mean of 404 but values running from 180 to 1585, it is clear that the data are quite asymmetric (in the statistical language, they are skewed to the right, meaning that there is a short fat tail to the left and a long skinny tail to the right). In such cases, it is better to give the median along with, or in place of, the mean. As an example, consider yearly income, where a small number of people have incomes of many millions of dollars, but the mean is much less than half of that and incomes cannot go below zero. The Census Bureau generally tabulates median incomes, not mean incomes.[5] In this

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[5] For example, on the first page of Highlights in *Income, Poverty, and Health Insurance Coverage in the United States: 2010*, the word "median" occurs 18 times; neither "mean" nor "average"

case, much of the information on the distribution of detention lengths can be approximated from Dr. Long's Table 3, but she does not give tables parallel to Table 3 for her other tables of detention lengths.

Next, recall that the "All cases" values are biased in favor of longer detention lengths. First, note that of the 1,000 class members in Dr. Long's analysis, 352 (35.2%) were out-of-period and 648 (64.8%) were in-period. Thus, the out-of-period aliens responsible for the bias form a substantial part of the data set she analyzed. To see the effect of that bias, compare the three parts of my table; for simplicity, I will only consider the bottom row (still detained equal to "All") of each part. I consider the most appropriate values those for the in-period aliens in the

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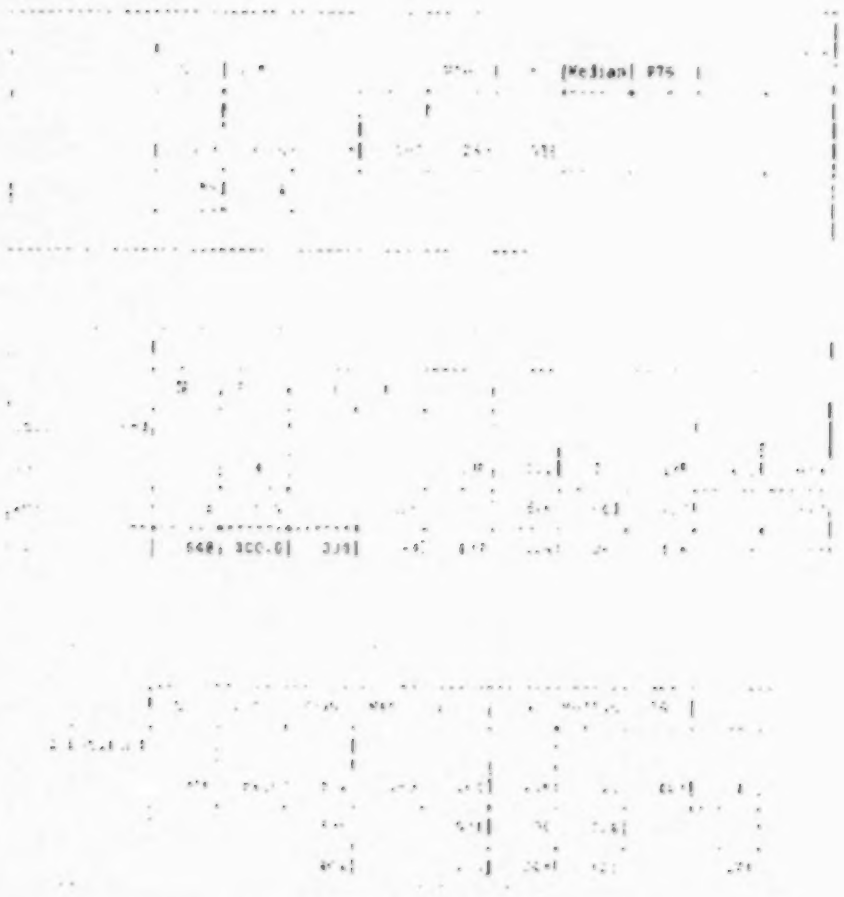
occurs at all. The report is at http://www.census.gov/hhes/www/income/data/incpovhlth/2010/index.html (visited December 12, 2012); click on Report, and go to page 5 for the "Highlights" section.

Table 2 from Dr. Long's Report
Average Days of Detention by Detention Category

Detention Category	Detention Days Average	Lowest	Highest
No longer detained	381	180	1,310
Still detained	805	558	1,585
All cases	404	180	1,585



middle of the table. There the median is 286 days and the mean is 334 days. Dr. Long's values (those in the bottom part of the table for the "All" group") have

median 342 days and mean 404 days. Those last values are higher than those for the in-period aliens because the values for the out-of-period aliens are higher still, with median 469 days and mean 531 days. These differences are not surprising because, as discussed above, the "All" group overrepresents aliens with long detentions. The differences between the in-period group and the "All" groups are quite substantial, both in the means (from 334 days to 404 days is a 21% increase) and in the medians (from 286 days to 342 days is a 20% increase).

The selection of the "right" number for a "typical" length of detention depends on the use to be made of the statistic. Note, though, that in this case the range of possible values is large; it goes from 286 days (the median for the in-period aliens) to 404 days (the mean for the complete data set), and from 286 days to 404 days is a 41% increase. The user of these statistics should give careful consideration to which measure is most appropriate for a particular purpose. In my opinion, if the purpose is solely to provide a number to serve as a "typical" value in an asymmetric distribution, the median is a better choice than the mean. Also, in my opinion, the values for the in-period aliens come from a more appropriate sample in terms of generalizing to the broader population of all class members. Note, by the way, that all these values (and all other values throughout both Dr. Long's report and my report) describe detention lengths only for class members; that is, for aliens detained at least 180 days. Aliens detained for shorter periods are not included in the data at all.

Finally, consider a point that Dr. Long makes in her report: Because some of the class members were still in detention, the means that she calculated are underestimates of the means that she would obtain if she had complete information on the lengths of detention. The statement is correct, but it is interesting to note that in this table the problem has no effect on the medians and very little effect on many of the other statistics. To see why, consider the middle section (the in-period aliens) of Table L-2. The row for "Still Detained" shows a minimum detention length of 558 days, so additional information could increase only those values that are already 558 days or more. Comparing that with the "All" row shows that additional information could only affect the mean, the 90th percentile, and the highest value because 558 days is already beyond all the other percentiles in the row; the median does not change. Also, in this particular table, the additional length of detention would need to be quite extreme to have a large effect even on the mean because only 5.4% of the detentions are ongoing. For example, if on the average those detentions lasted an additional year, the mean would increase by .054 years, or about 20 days. Of course, still longer stays would affect the mean by more; and there are other tables where the proportion of those still in detention is higher and therefore the additional lengths of detention might have larger effects on the mean.

C. Differences in Interpretation for Other Tables

In this section, I will review the tables in Dr. Long's report and the interpretation of her results as it is affected by the results in Appendix C of this report. Although I will briefly mention each table, I obviously

cannot discuss every number; so I will concentrate on those situations where I believe the new tables have the most important effects on the interpretation of the results.

Looking overall, I would summarize these differences as follows: The two issues (in-period versus all and median versus mean) have substantial effects on the results of analyses of detention length. For other tables, the in-period versus all issue matters, but the median versus mean distinction does not because the tables involve only counts and percentages. For those other tables, the in-period versus all has some effect on the percentages for types of court proceedings (out-of-period aliens have more), but not much effect on other percentages such as the percentages of those applying for or receiving relief.

Dr. Long's Table 1 shows counts and percentages for how many of the class members are still detained. The proportion is almost exactly the same for in-period aliens and out-of-period aliens, and thus also for all aliens in the data.

I have discussed Dr. Long's Table 2 in detail above. Her Tables 3 and 4 provide additional detail on the distribution of lengths of detention. Because they tabulate probabilities, the mean vs. median issue does not apply to them. But it does make a difference whether the table includes all those in the data set or just the in-period aliens because the full data set includes the out-of-period aliens, who generally have longer detention periods. For example, only 33% of the in-period aliens were detained 12 months or more

(i.e., 360 days or more), as compared with 47% of all aliens in the data set, the figure in Dr. Long's Table 3.

Dr. Long's Table 5 give counts and percentages for how many class members have cases involving various courts. Unsurprisingly, the out-of-period aliens, who are included in the data set only if they have long periods of detention, tend to involve more courts. For example, 30% of the in-period aliens have cases involving BIA court proceedings, compared with 46% of the out-of-period aliens and 36% of the aliens in the full data set. So, if one agrees that the results for the in-period aliens are most appropriate, Dr. Long's table, which uses the full data set, somewhat overstates the proportion of class members with BIA court proceedings and Ninth Circuit Proceedings.

Dr. Long's Table 6 shows detention length by type of court proceedings. One oddity of this table is that it does not show the 60 cases that do not follow any of the three patterns of court involvement in her tables, even though they are included in her "All cases" line. For this table, there are the same kind of differences between in-period aliens and the full data set, and between means and medians, as I discussed above for Table 6. Thus, for class members with immigration court proceedings only, Dr. Long shows a mean length of detention of 330 days; the median for this group is 294 days. For the in-period aliens in this group, the mean is 292 days and the median is 260 days. The difference between the median of the in-period group and the mean of the all group is substantial, although a bit smaller than in Table 2; from 260 days to 330 days is a 27% increase. For the in-period aliens, the 25th percentile of this group is 217 days, so 25% of them

had detention lengths from 180 days to 217 days. There are similar differences for the other groups in the table, although the pattern remains that those with more proceedings do, as expected, have longer periods of detention.

Dr. Long's Tables 7-10 show percentages for applications for relief and cases where relief was granted. There is little difference between the percentages for in-period and out-of-period aliens.

Dr. Long's Table 11 shows detention length by whether the class member filed an application for relief. Here again, there are substantial differences between in-period aliens and the full data set, and between means and medians. Thus, for those not filing any application for relief, her table shows a mean of 360 days; for in-period aliens only, the mean was 288 days and the median was 253 days. From 253 days to 360 days is a 42% increase. For those who did file applications for relief, her table shows a mean of 421 days; for in-period aliens only, the mean was 352 days and the median was 303 days. From 303 days to 421 days is a 39% increase. Thus, the combined effects on the sample and the choice of mean and median are very similar in both cases to the 41% increase in Table 2.

Dr. Long's Table 12 shows detention length by types of proceedings and whether the class member applied for relief. Note that, because of the number of combinations shown in the table, Table L-12 in Appendix C extends over three pages (although some of the numbers duplicate those in Table 6 and Table 11). Because of the complexity here, I am not going to sum-

marize the situation except to note that there are the same kind of between in-period aliens and the full data set, and between means and medians, as in the previous tables, although the size of the effect varies from one group to another.

Dr. Long's Table 13 shows counts and percentages for case outcomes and her Table 14 shows the basis on which class members won their cases. In general, there are few dramatic differences between in-period aliens and out-of-period aliens in these tables.

Dr. Long's Table 15 shows lengths of detention by outcome. Again, there are the usual differences between in-period aliens and the full data set, and between means and medians. For simplicity, I will discuss only one in detail. For aliens who won their cases, Dr. Long's table shows a mean length of detention of 342 days. For in-period aliens who won their cases, the mean length of detention was 286 days and the median was 257 days. As usual, the overall difference is substantial; from 257 days to 342 days is a 33% increase.

Finally, Dr. Long's Table 16 shows the lengths of detention by type of proceedings for just those aliens who won their cases. Again, there are substantial differences between in-period aliens and the full data set, and between means and medians. It is also worth noting that some of these averages should be viewed with caution because they are based on very small numbers of individuals; there were 227 aliens who won their cases overall, but only 28 who won after BIA and immigration proceedings and only 6 who won after Ninth Circuit, BIA, and Immigration Court proceed-

ings, and the counts are even smaller for just in-period aliens in these groups. Averages (or medians, for that matter) based on such small samples may not be reliable estimates of the values that would be obtained for the entire class.

III. More on the Lengths of Delays Attributable to Adjournments Requested by the Aliens

In this section, I provide information on lengths of detention in the context of the results in my original report regarding delays attributable to requests by the aliens.[6] Table 4 and 5 of my first report gave information on the lengths of the delays attributable to adjournments requested by the in-period aliens, and Tables B-4 and B-5 gave similar information for out-of-period aliens and for all aliens in the data set.

The table below gives information on the proportion of the total detention time for each alien attributable to requests by the alien, where total time in detention is calculated as described in Section 2 of Appendix B. Thus, for half of the in-period aliens, 34.2% or more of their detention time was spent in delays attributable to the alien. That proportion was 50% or more for 28.7% of the in-period aliens, although that number cannot be read from the table below.

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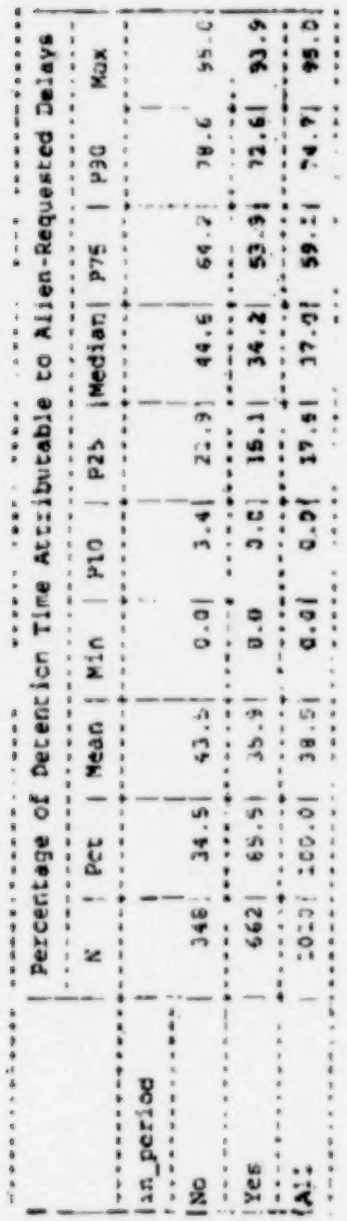
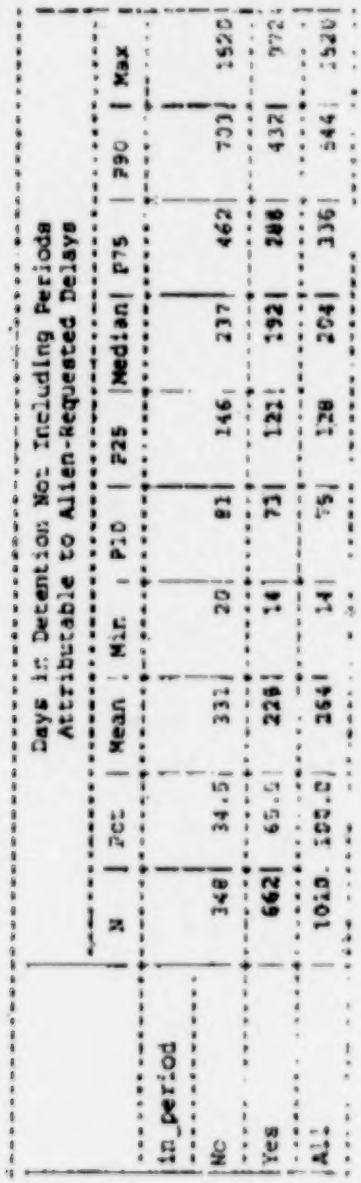
[6] In this section, I use the phrase "delays attributable to requests by the alien" to mean the delay between the date of a hearing that was adjourned at the request of the alien to the next hearing date for the same alien. For more detail on the conventions I used in calculating the lengths of the delays, see pages 7 and 8 of my earlier report.



in_period	N	Pct	Mean	Min	P10	P25	Median	P75	P90	Max
No	348	34.5	43.5	0.0	3.4	20.9	44.6	64.2	78.6	95.0
Yes	662	65.5	35.9	0.0	3.0	15.1	34.2	53.9	72.6	93.9
All	1010	100.0	38.5	0.0	3.0	17.6	37.0	59.2	74.7	95.0

The length of time in detention that was NOT attributable to alien-requested delays may also be of some interest. The table below gives information on the distribution of those lengths of time. For in-period aliens, the 25th percentile was 121 days and the median was 192 days. Thus, EXCLUDING time attributable to alien-requested delays, 25% of the in-

period aliens spent 121 days or less in detention and half of the in-period aliens spent 192 days or less in detention. The total detention time EXCLUDING time attributable to alien-requested delays was under 180 days for 45.9% of the in-period aliens, although that number cannot be read from the table below.



in_period	Days in Detention Not Including Periods Attributable to Alien-Requested Delays									
	N	Pct	Mean	Min	P10	P25	Median	P75	P90	Max
No	348	34.5	331	20	81	146	237	462	733	1520
Yes	662	65.5	228	14	73	121	192	288	432	772
All	1010	100.0	264	14	75	128	204	336	544	1520

IV. Statement of Compensation and Signature

The author of this report is employed by ERS Group, which currently bills his time at $475 per hour.

Dec. 14, 2012 — Date

/s/ CHESTER I. PALMER
CHESTER I. PALMER

Appendix A

Discussion of Appropriate Sample from my Original Report

[Reproduced JA 140-143, *supra*]

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Appendix B

Information about the Analysis Data Sets

1. The Accuracy of My Analysis Data Set

At my deposition in this matter, I was asked a number of questions about situations in which there appeared to be disagreements between the entries in the spreadsheet AC_Delays, which formed the principal basis for my analysis data set, and the entries in the Action Table of an EOIR Microsoft Access database also provided by respondents in discovery. At the deposition, I pointed out that the apparent discrepancies were only a problem for my analyses if, in fact, the data I used were incorrect.

I have reviewed the declaration of Benjamin B. McDowell dated December 14, 2012. Mr. McDowell is an employee of the Executive Office of Immigration Review who routinely uses the EOIR CASE database and who used it to prepare the two data sets discussed above. McDowell Dec. ¶¶1-3. He states that the information in my analysis database on the dates of delays and the reasons for those delays comes from the Schedule Table, the database table that is used to record and analyze that information. Id. at ¶¶4-6. He further states that the Action table is maintained

for the purpose of auditing the addition of information to the CASE database and is designed in such a way that there is no easy way to match the information in that table with the information in the Schedule Table; therefore, the fact that the records do not match does not cause him to doubt the reliability of the information in the Schedule Table from which my analysis database is derived. Id. at ¶7. Thus, the apparent disagreements provide no reason for me to doubt the reliability of results based on my analysis database, either the results in my previous report or those presented in this report.

2. Disagreements between Dr. Long's and My Analysis Data Sets

In our initial reports, Dr. Long and I both explained that we excluded certain observations from our analyses. Dr. Long's analysis data set included 1,000 aliens; mine included 1,010. Dr. Long's data set contained 11 aliens that mine did not; mine contained 21 aliens that hers did not; and there were 989 aliens in both data sets. So the two data sets had about 98-99% of the same individuals. Also, I had more recent information on a small number of aliens, and I filled in some missing dates and made a few corrections in the dates. It would be reasonable to want to know how much the differences between data sets might have affected the results.

My earlier report provided counts and percentages involving the numbers of adjournments requested by the aliens. Dr. Long's report did not address those issues. Dr. Long's report provided information on the lengths of detention and on the types and outcomes of

relief applications and court proceedings. My report did not address those issues. To investigate the effects of the differences between the data sets, it is necessary to perform the same analyses on both data sets to see the extent to which they agree. Because my report presented only counts and percentages, and because 98% of the aliens in my data set were also in Dr. Long's data set (where they formed 99% of her data), the results of my analyses would have changed little if I had run them on the aliens in her data set. The same is true of the percentages in her report. On the other hand, it is possible that the means might be somewhat different because a mean can be affected substantially by a few very large observations. (This fact is one reason for preferring the median in many situations.) So I reran my equivalent of Dr. Long's Table 2 on my data. The most recent date that an alien left custody in my data set was September 25, 2012. So I treated that as the last day of detention for aliens still in custody, in parallel to the way that Dr. Long treated April 28, 2012 as the last day of detention for aliens still in custody in her data set.

The parts of the two tables for in-period aliens and for all cases are on the next page.[7] Note that because some aliens have moved from still detained in Dr. Long's analyses to not still detained in my analyses, we should not expect the "Yes" and "No" rows to be comparable. For the "All" row for in-period aliens, Dr. Long's data set gives a mean of 334 days and a median of 286 days; my data gives a mean of 347 days and a

[7] The part of the table for out-of-period aliens is of little independent interest, so I have omitted it for simplicity.

median of 294 days. For all aliens in the data set, Dr. Long's data gives a mean of 404 days and a median of 342 days; my data set gives a mean of 416 days and a median of 343 days. So the differences in the means between the two data sets are small compared to the differences between the mean and median or between the difference between in-period aliens and all aliens; as expected from the fact that my data set extends later in time, the values from my data set are slightly larger than those from Dr. Long's data set. The medians are closer still. In fact, for the overall data set, the values at the 10th percentile, 25th percentile, and median all differ by two days or less, and the difference at the 75th percentile is only 8 days. Except for the largest values (the 90th percentile and maximum), which are affected by the additional time added for those still in custody, the differences are small. In general, it seems unlikely that the difference in data sets is of any practical importance in the interpretation of the results.

Results from Dr. Long's Data

in_period Yes

	Length of Detention (days)									
	N	Pct	Mean	Min	P10	P25	Median	P75	P90	Max
Still Detained										
No	613	94.6	331	180	196	223	278	375	490	933
Yes	35	5.4	635	558	569	586	641	767	856	897
All	648	100.0	334	180	197	224	286	408	558	987

All

	Length of Detention (days)									
	N	Pct	Mean	Min	P10	P25	Median	P75	P90	Max
Still Detained										
No	946	94.6	381	180	204	246	330	463	617	1310
Yes	54	5.4	805	558	571	604	724	934	1118	1585
All	1000	100.0	401	180	205	249	342	499	673	1585

Results from My Data

in_period Yes

	Length of Detention (days)									
	N	Pct	Mean	Min	P10	P25	Median	P75	P90	Max
Still Detained										
No	643	97.1	332	180	197	223	267	401	530	958
Yes	19	2.9	954	713	733	754	937	943	1021	1337
All	662	100.0	347	180	197	224	298	455	567	1037

All

	Length of Detention (days)									
	N	Pct	Mean	Min	P10	P25	Median	P75	P90	Max
Still Detained										
No	983	97.3	403	180	208	247	336	492	680	1685
Yes	27	2.7	952	713	735	802	937	1084	1232	1366
All	1010	100.0	436	180	205	253	343	509	735	1685

Appendix C

Tables Using Dr. Long's Data Parallel to Tables 1 to 16 in Her Report

Table L 1
Cases by Detention Category as of April 28, 2012

	in_period					
	No		Yes		All	
	Count	Pct	Count	Pct	Count	Pct
Detention Category						
No longer detained	333	94.6	613	94.6	946	94.6
Still detained	19	5.4	35	5.4	54	5.4
All	352	100.0	648	100.0	1000	100.0

Table L 2
Days of Detention by Detention Category

in_period No

	Length of Detention (days)									
	N	Pct	Mean	Min	P10	P25	Median	P75	P90	Max
Still Detained										
No	333	94.6	509	187	280	336	453	608	827	1310
Yes	19	5.4	1026	562	571	933	1026	1171	1304	1585
All	352	100.0	533	187	282	346	469	651	911	1585

in_period Yes

	Length of Detention (days)									
	N	Pct	Mean	Min	P10	P25	Median	P75	P90	Max
Still Detained										
No	613	94.6	316	180	196	222	278	375	490	839
Yes	35	5.4	695	558	569	584	681	767	956	987
All	648	100.0	334	180	197	224	286	408	558	887

All

	Length of Detention (days)									
	N	Pct	Mean	Min	P10	P25	Median	P75	P90	Max
Still Detained										
No	946	94.6	381	180	204	246	330	463	617	1310
Yes	54	5.4	805	558	573	604	726	934	1118	1585
All	1000	100.0	404	180	205	249	342	499	693	1585

Table L-1
Cases by Detention Period

	In period											
	No				Yes				All			
	Detention That Long?				Detention That Long?				Detention That Long?			
	No		Yes		No		Yes		No		Yes	
Detention Period	N	Pct	N	Pct	N	Pct	N	Pct	N	Pct	N	Pct
06 months or more	0	0	352	100.0	0	0	648	100.0	0	0	1000	100.0
07 months or more	31	8.9	349	91.1	112	17.3	536	82.7	135	13.5	865	86.5
08 months or more	121	34.4	340	96.6	209	32.9	441	68.1	319	31.9	781	78.1
09 months or more	27	7.7	325	92.3	289	44.3	361	55.7	316	31.6	686	68.6
10 months or more	52	14.8	300	85.2	357	55.2	291	44.9	409	40.9	591	59.1
11 months or more	77	21.9	275	78.1	396	61.1	252	38.9	473	47.3	527	52.7
12 months or more	97	27.6	254	72.4	434	67.0	214	33.0	531	53.1	469	46.9
13 months or more	129	36.6	222	63.4	470	72.5	178	27.5	599	59.9	401	40.1
14 months or more	149	42.3	203	57.7	498	76.9	150	23.1	647	64.7	353	35.3
15 months or more	163	46.3	189	53.7	529	81.6	119	18.4	691	69.1	309	30.9
16 months or more	182	51.7	170	48.3	545	84.1	103	15.9	727	72.7	273	27.3
17 months or more	192	54.5	160	45.5	565	87.2	83	12.8	757	75.7	243	24.3
18 months or more	208	59.1	144	40.9	577	89.0	71	11.0	785	78.5	215	21.5
24 months or more	282	80.1	70	19.9	632	97.5	16	2.5	914	91.4	86	8.6

Notes: A "month" is defined as a 30-day period.
Some class members were still detained at the end of the analysis period, so the counts for 24 months may be underestimates.

Table L-4
Probability of Continued Detention

in_period No

	Still detained at 12 months				Still detained at 18 months				Still detained at 24 months			
	No		Yes		No		Yes		No		Yes	
	N	Pct	N	Pct	N	Pct	N	Pct	N	Pct	N	Pct
start_per												
Those detained 07 months	84	26.9	255	73.1	215	61.6	134	38.4	279	79.3	70	20.2
Those detained 08 months	85	25.0	255	75.0	216	63.6	134	39.4	270	79.4	70	20.6
Those detained 09 months	70	31.5	255	78.5	171	58.8	134	42.2	255	78.5	70	21.5
Those detained 10 months	65	35.0	255	85.0	160	55.3	134	44.7	238	76.7	70	23.3
Those detained 11 months	28	7.5	255	85.0	141	51.3	134	48.7	205	74.5	70	25.5
Those detained 12 months	3	0	255	100.0	121	47.5	134	52.5	125	72.5	70	27.5

in_period Yes

	Still detained at 12 months				Still detained at 18 months				Still detained at 24 months			
	No		Yes		No		Yes		No		Yes	
	N	Pct	N	Pct	N	Pct	N	Pct	N	Pct	N	Pct
start_per												
Those detained 07 months	222	60.1	214	39.3	465	86.9	71	13.2	520	97.0	36	6.0
Those detained 08 months	222	61.6	214	46.5	370	83.3	71	16.1	425	96.4	36	3.6
Those detained 09 months	147	42.7	214	59.3	298	80.3	71	19.7	345	95.6	36	4.4
Those detained 10 months	77	28.5	214	73.5	222	76.6	71	24.4	175	94.5	36	5.5
Those detained 11 months	34	15.1	214	84.9	141	71.8	71	24.2	236	93.7	36	6.3
Those detained 12 months	0	0	214	100.0	143	66.8	71	33.2	230	92.5	36	7.2

All

	Still detained at 12 months				Still detained at 18 months				Still detained at 24 months			
	No		Yes		No		Yes		No		Yes	
	N	Pct	N	Pct	N	Pct	N	Pct	N	Pct	N	Pct
start_per												
Those detained 07 months	416	47.3	469	53.3	680	76.4	205	23.3	749	90.5	66	3.7
Those detained 08 months	312	59.7	469	60.1	576	73.8	205	26.2	635	89.9	66	11.0
Those detained 09 months	317	31.6	469	68.4	431	70.1	205	29.9	600	87.5	66	12.5
Those detained 10 months	122	20.6	469	79.4	300	65.8	205	34.7	505	85.6	66	14.4
Those detained 11 months	58	12.3	469	89.0	332	61.1	205	38.9	441	83.4	66	16.3
Those detained 12 months	3	0	469	100.0	264	56.3	205	43.7	383	81.7	66	18.2

Note: A "month" is defined as a 30-day period.

Table L-5
Court Involvement in Cases

	in_period					
	No		Yes		All	
	N	Pct	N	Pct	N	Pct
All	352	100.0	648	100.0	1000	100.0
Immigration Court Proceeding(s)						
No	23	6.5	34	5.2	57	5.7
Yes	329	93.5	614	94.8	943	94.3
BIA Court Proceeding(s)						
No	189	53.7	455	70.2	644	64.4
Yes	163	46.3	193	29.8	356	35.6
9th Circuit Court Proceeding(s)						
No	257	73.0	546	84.3	803	80.3
Yes	95	27.0	102	15.7	197	19.7

Table E-6
Days of Detention by Court Involvement

In period 89

	Length of Detention (days)									
	N	Pct	Mean	Min	P10	P25	Median	P75	P90	Max
Proceedings										
1: Immigration Court Only	164	54.3	422	207	266	304	359	491	648	2092
2: BIA and Immigration	80	26.5	633	216	283	396	519	646	759	1304
3: 9th Cir, BIA, and Imm	27	8.9	778	241	453	579	726	979	1333	1585
Other	29	9.6	585	329	335	359	468	893	893	1248
ALL	352	100.0	531	187	292	346	409	658	911	1948

In period Two

	Length of Detention (days)									
	N	Pct	Mean	Min	P10	P25	Median	P75	P90	Max
Proceedings										
1: Immigration Court Only	447	69.0	282	120	156	214	260	343	436	841
2: BIA and Immigration	98	11.6	383	1931	274	276	354	499	611	613
3: 9th Cir, BIA, and Imm	46	11.7	556	160	338	423	573	648	796	884
Other	37	6.2	234	180	184	193	219	312	421	591
ALL	618	100.0	336	180	197	224	286	358	559	887

All

	Length of Detention (days)									
	N	Pct	Mean	Min	P10	P25	Median	P75	P90	Max
Proceedings										
1: Immigration Court Only	611	63.7	333	180	202	231	234	355	499	1072
2: BIA and Immigration	156	15.6	446	180	253	296	421	547	837	1304
3: 9th Cir, BIA, and Imm	133	13.3	667	180	377	534	621	824	1009	1585
Other	66	6.6	393	180	194	217	335	494	752	1082
ALL	1007	100.0	404	180	235	249	342	499	673	1585

Table L-7A
Whether Filed Relief Application

	In period					
	No		Yes		All	
	N	Pct	N	Pct	N	Pct
Applied for Relief						
No	105	29.8	182	28.1	287	28.7
Yes	247	70.2	466	71.9	713	71.3
All	352	100.0	648	100.0	1000	100.0

Table L-7B
Whether Relief Granted by IJ

	In period					
	No		Yes		All	
	N	Pct	N	Pct	N	Pct
Granted Relief						
No	147	57.6	295	63.3	462	64.8
Yes	98	32.4	171	36.7	251	35.2
All	345	100.0	466	100.0	713	100.0

Table L-7C
Whether Relief Granted is Final Outcome

	In period					
	No		Yes		All	
	N	Pct	N	Pct	N	Pct
Granted Final Relief						
No	7	8.0	15	8.8	22	8.8
Yes	81	31.3	156	91.2	229	91.2
All	88	100.0	171	100.0	251	100.0

Notes: Final outcome still pending in 12 cases granted relief by IJ.
In 10 cases, initial decision was overturned or alien left country for other reasons

Table I-8
Relief Applications Filed by Type

	in_period					
	No		Yes		All	
	N	Pct	N	Pct	N	Pct
Did not File for Relief						
None	105	29.8	182	28.1	287	28.7
All	105	29.8	182	28.1	287	28.7
Filed for Relief						
Only applying for NACARCAT	8	2.3	20	3.1	28	2.8
Other types of applications	141	40.1	288	44.4	429	42.9
EOIR 42A applications filed	98	27.8	158	24.4	256	25.6
All	247	70.2	466	71.9	713	71.3
All	352	100.0	648	100.0	1000	100.0

Table I-9
Results of Applications for Cancellation of Removal under 240A(a)

	in_period					
	No		Yes		All	
	N	Pct	N	Pct	N	Pct
Granted Relief by IJ						
No	52	53.1	76	48.1	128	50.0
Yes	46	46.9	82	51.9	128	50.0
All	98	100.0	158	100.0	256	100.0

Table I-10A
Whether Filed for Relief (Excluding Those Filing Only for Withholding of Removal and/or CAT)

	In_period					
	No		Yes		All	
	N	Pct	N	Pct	N	Pct
Filed for Relief						
No	113	32.1	202	31.2	315	31.5
Yes	239	67.9	446	68.8	685	68.5
All	352	100.0	648	100.0	1000	100.0

Table I-10B
Whether Relief Granted by IJ
Among Those Who Filed for Relief (Excluding Those Filing Only for Withholding of Removal and/or CAT)

	In_period					
	No		Yes		All	
	N	Pct	N	Pct	N	Pct
grt relief2						
No	169	70.7	294	65.9	463	67.6
Yes	70	29.3	152	34.1	222	32.4
All	239	100.0	446	100.0	685	100.0

Table I-10C
Whether Relief Granted is Final Outcome Among Those Granted Relief by IJ
Among Those Who Filed for Relief (Excluding Those Filing Only for Withholding of Removal and/or CAT)

	In_period					
	No		Yes		All	
	N	Pct	N	Pct	N	Pct
won relief2						
No	3	4.3	3	2.0	6	2.7
Yes	67	95.7	149	98.0	216	97.3
All	70	100.0	152	100.0	222	100.0

Table 3.11
Detention Times by Whether Application for Relief Filed

In period No

	Length of Detention (days)									
	N	Pct	Mean	Min	P10	P25	Median	P75	P90	Max
Filed For Relief										
No	105	29.8	434	187	257	310	384	531	960	1304
Yes	247	70.2	561	217	294	377	505	692	983	1665
All	352	100.0	531	187	282	344	459	651	911	1585

In period Yes

	Length of Detention (days)									
	N	Pct	Mean	Min	P10	P25	Median	P75	P90	Max
Filed For Relief										
No	182	28.2	208	160	182	210	253	316	426	759
Yes	466	71.9	352	188	199	232	303	433	668	887
All	648	100.0	434	188	197	224	285	408	558	887

All

	Length of Detention (days)									
	N	Pct	Mean	Min	P10	P25	Median	P75	P90	Max
Filed For Relief										
No	287	28.7	362	160	188	227	299	459	591	1304
Yes	713	71.3	421	160	213	262	347	523	796	1585
All	1000	100.0	404	160	205	249	340	499	673	1585

Table L-12
Detention Times by Type of Proceedings and Whether Filed for Relief

In period No

	Length of Detention (days)									
	N	Pct	Mean	Min	P10	P25	Median	P75	P90	Max
1. Immigration Court Only										
Did not File for Relief	45	13.1	337	187	225	268	315	383	456	524
Filed for Relief	108	39.2	431	217	282	321	413	534	671	1092
All	104	52.3	428	187	266	304	382	494	643	1092
2. BIA and Immigration										
Did not File for Relief	13	3.7	453	216	294	310	387	536	562	1104
Filed for Relief	56	15.6	551	230	295	452	534	687	759	992
All	68	18.3	532	216	280	394	519	645	759	1104
3. 4th Cir, BIA, and Imm										
Did not File for Relief	44	6.6	688	285	377	483	665	981	1118	2304
Filed for Relief	51	15.1	819	281	576	625	739	970	1133	1585
All	71	21.9	776	281	457	579	726	970	1133	1585
Other										
Did not File for Relief	22	6.3	589	329	335	359	495	844	974	1082
Filed for Relief	1	0.3	370	370	370	370	370	370	370	370
All	22	6.5	580	329	335	359	468	833	973	1082
All										
Did not File for Relief	105	29.8	484	187	257	310	384	531	960	1104
Filed for Relief	247	70.2	551	217	294	377	506	672	901	1585
All	352	100.0	531	187	283	346	469	651	911	1585

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Table 6-12 (continued)
Detention Times by Type of Proceedings and Whether Filed for Relief

in period Yes

	Length of Detention (days)									
	N	Pct	Mean	Min	P10	P25	Median	P75	P90	Max
1: Immigration Court Only										
Did not File for Relief	112	17.3	258	180	190	203	236	287	390	621
Filed for Relief	335	59.7	303	180	196	222	272	363	449	831
All	447	59.0	292	180	195	217	260	340	425	831
2: BIA and Immigration										
Did not File for Relief	22	3.4	307	182	227	255	293	350	414	430
Filed for Relief	58	10.2	409	180	238	278	387	500	642	800
All	80	13.6	383	180	227	276	384	477	563	800
3: 9th Cir BIA, and Imm										
Did not File for Relief	14	2.2	522	180	299	415	549	603	641	759
Filed for Relief	62	9.6	566	193	336	432	582	660	824	887
All	76	11.7	556	180	305	419	573	661	799	887
Other										
Did not File for Relief	34	5.7	205	181	199	209	261	336	423	591
Filed for Relief	3	0.5	189	190	190	190	188	199	199	199
All	37	5.7	204	180	188	199	209	336	423	591
All										
Did not File for Relief	182	28.1	288	180	192	214	253	336	423	759
Filed for Relief	466	71.9	357	180	199	232	303	411	565	887
All	648	123.0	334	180	197	224	286	409	558	887

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Table 5.12 (continued)
Detention Times by Type of Proceedings and Whether Filed for Relief

In period All

	Length of Detention (days)									
	N	Pct	Mean	Min	P10	P25	Median	P75	P90	Max
1: Immigration Court Only										
Did not File for Relief	158	15.6	301	180	195	211	257	322	408	926
Filed for Relief	473	42.3	346	180	293	240	307	422	531	1092
All	631	83.1	330	180	291	231	294	395	499	1092
2: BIA and Immigration										
Did not File for Relief	35	3.5	361	182	227	265	315	414	516	1104
Filed for Relief	121	12.1	473	180	259	335	421	587	718	922
All	156	15.6	448	180	252	296	421	547	697	1104
3: 9th Cir, BIA, and Imm										
Did not File for Relief	38	3.8	633	188	159	457	562	718	1139	1908
Filed for Relief	115	11.5	603	193	301	540	652	448	982	1585
All	153	15.3	667	188	377	534	621	924	1039	1585
Other										
Did not File for Relief	56	5.6	405	181	197	231	306	481	433	1082
Filed for Relief	4	3.4	234	190	180	184	194	284	370	370
All	60	6.0	399	180	194	217	335	454	752	1082
All										
Did not File for Relief	287	28.7	360	180	198	227	289	409	531	1384
Filed for Relief	713	71.3	421	180	213	252	367	529	706	1585
All	1000	100.0	404	180	205	249	342	499	673	1585

Table L-13
Outcomes of Cases as of April 28, 2012

	in_period					
	No		Yes		All	
	N	Pct	N	Pct	N	Pct
outcome						
Won case	87	24.7	176	27.2	263	26.3
Case still pending	58	16.5	102	15.7	160	16.0
Deportation ordered (not departed)	19	5.4	68	10.5	87	8.7
Voluntary departure	12	3.4	34	5.2	46	4.6
Removal	176	50.0	268	41.4	444	44.4
All	352	100.0	648	100.0	1000	100.0

Table L-14
Basis for Winning Case

	in_period					
	No		Yes		All	
	N	Pct	N	Pct	N	Pct
Basis						
Case terminated	14	16.1	20	11.4	34	12.9
Individual won case	73	83.9	156	88.6	229	87.1
All	87	100.0	176	100.0	263	100.0

Table 5-15
Detention Times by Outcome

In period 5)

	Length of Detention (days)									
	N	Pct	Mean	Min	P10	P25	Median	P75	P90	Max
New case	97	24.9	456	21	300	378	429	562	649	689
Case still pending	58	14.9	651	247	285	340	440	916	1233	1382
Deportation ordered (not departed)	19	5.4	690	248	300	439	569	826	1048	1139
Voluntary departure	12	3.4	377	283	286	289	369	437	456	591
Removal	230	58.9	918	2261	333	384	485	656	877	1113
All	358	100.0	511	1971	302	366	469	691	911	1385

In period Two

	Length of Detention (days)									
	N	Pct	Mean	Min	P10	P25	Median	P75	P90	Max
New case	376	97.2	286	189	283	216	257	336	431	524
Case still pending	102	15.9	459	183	261	248	436	678	759	887
Deportation ordered (not departed)	68	10.5	468	198	263	249	384	647	583	754
Voluntary departure	31	5.3	291	188	263	282	318	356	448	581
Removal	368	62.8	319	186	282	278	287	330	496	937
All	643	100.0	338	186	297	224	266	428	648	937

All

	Length of Detention (days)									
	N	Pct	Mean	Min	P10	P25	Median	P75	P90	Max
New case	953	21.3	382	189	197	224	258	421	548	648
Case still pending	428	18.2	566	197	227	283	502	715	938	1386
Deportation ordered (not departed)	87	8.7	615	188	225	262	385	696	604	1139
Voluntary departure	45	4.5	335	188	188	224	270	381	435	582
Removal	456	44.8	194	188	209	250	339	495	661	1238
All	1988	100.0	408	188	205	243	362	438	677	1385

Table 1.18
Detention Times for Class Members who won Case by Type of Proceedings

In_period No

	Length of Detention (days)									
	N	Pct	Mean	Min	P10	P25	Median	P75	P90	Max
1: Immigration Court Only	88	38.3%	830	246	288	382	481	906	1230	1864
2: BIA and Immigration	14	18.4%	579	216	320	412	596	720	825	840
3: 9th Cir, BIA, and Imm	3	3.8%	435	387	387	389	435	462	483	483
Other	1	1.1%	335	335	335	335	335	335	335	335
All	87	100.0%	456	216	260	346	629	963	1539	1839

In_period Yes

	Length of Detention (days)									
	N	Pct	Mean	Min	P10	P25	Median	P75	P90	Max
1: Immigration Court Only	155	90.1%	370	180	182	223	282	379	497	587
2: BIA and Immigration	12	6.8%	436	180	262	310	390	524	548	705
3: 9th Cir, BIA, and Imm	4	2.3%	435	362	369	402	426	459	480	540
Other	1	0.6%	180	180	180	180	180	180	180	180
All	172	100.0%	386	180	190	224	287	386	491	706

All

	Length of Detention (days)									
	N	Pct	Mean	Min	P10	P25	Median	P75	P90	Max
1: Immigration Court Only	227	66.3%	339	180	185	222	393	891	1090	1864
2: BIA and Immigration	38	10.8%	509	180	216	358	532	693	743	840
3: 9th Cir, BIA, and Imm	9	2.3%	426	362	343	389	435	476	540	540
Other	2	0.8%	262	180	180	262	262	335	335	335
All	276	100.0%	369	180	197	224	388	613	838	1864

Declaration of Ahilan T. Arulanantham

I, Ahilan Arulanantham, hereby declare:

1. I am the Deputy Legal Director of the American Civil Liberties Union of Southern California, a senior staff attorney for the ACLU Immigrants' Rights Project, and counsel of record for Petitioners in *Rodriguez v. Robbins*, CV 07-3239-TJH (RNBx) ("*Rodriguez*"). This declaration is being offered in support of Petitioners' Motion for Summary Judgment or, in the Alternative, Summary Adjudication and in opposition to any Cross-Motion filed by Respondents. I make this declaration based on my own personal knowledge and if called to testify I could and would do so competently as follows.

Overview

2. For purposes of the statements that follow, I refer to the "studied class members" as the approximately 1,000 individuals whose A files we received, and about whom we also received information from databases kept and maintained by two of the Respondents in this action, the Executive Office for Immigration Review ("EOIR") and Immigration and Customs Enforcement ("ICE") (hereafter, the "database information"). Although there were a few individuals for whom we received files but not database information, and although not all of these individuals were in fact class members, I generally refer to the approximately 1,000 individuals about whom Respondents produced information as the "studied class members" for ease of reference.

3. Prior to the production of information concerning these roughly 1,000 individuals, Respondents

provided Petitioners' counsel a "snapshot" list of all class members detained as of a single day on or about April 30, 2010, shortly after the district court ordered Respondents to do so. A copy of the court's order can be found in this Court's PACER file at docket #67. Respondents produced another such "snapshot" list on February 24, 2011. This first list contained the names of approximately 400 individuals. The second list contained the names of approximately 360 individuals. We did not use those snapshot lists for any purpose other than to determine the numerosity of the class, and then to determine the numerosity of each subclass by interviewing individuals whose names appeared on those lists. I do not refer to them again in this declaration.

4. Pursuant to a discovery agreement between the parties, Respondents represented that the database information and A files they provided to us pertained to class members detained six months or longer in the Central District during the period from April 21, 2011 until approximately April 21, 2012, who spent a substantial portion of their time in detention in the Central District. Attached as Exhibit 1 to this declaration is a true and correct copy of correspondence from Respondents' Counsel Theodore Atkinson memorializing that agreement.

Database Information

5. Representatives of Respondents testified at deposition that information in those databases is reliable and relied upon by Respondents in the course of their regularly conducted activities. *See* Deposition of Sean Stephens at 21:24-22:14 (attached as Ex. I to the Declaration of Cody Jacobs); Deposition of Jen-

nifer Sherriff at 14:14-15:1 (Jacobs Decl. Ex. H); Deposition of Benjamin McDowell at 152:17-153:5 (Jacobs Decl. Ex. G).

6. The databases produced by Respondents include a variety of information about the studied class members, including when each studied class member was detained and released, whether he or she applied for any relief from removals, the outcome of any such applications, and other information.

A Files

7. I have litigated cases involving immigrants for over twelve years, and in that capacity have reviewed many immigrants' A files. Based on that experience, I am aware that an A file is a comprehensive file maintained by the government that contains records related to an individual's immigration proceedings, including custody review documents, court filings and decisions, and applications for relief. *See also* Dkt # 165 at p. 32 (Respondents defining an A-File as "a record containing documentation regarding an individual's interaction with U.S. Citizenship and Immigration Services (USCIS), Customs and Border Protection (CBP), ICE and the Department of Justice as prescribed by the Immigration and Nationality Act (INA) and other regulations regarding immigration benefits.").

8. Respondents initially objected to producing A files, requiring Petitioners to bring a motion to compel. Dkt. # 165. On April 25, 2011, Magistrate Judge Block issued an order compelling Respondents to produce, *inter alia*, what amounted to approximately 1,000 A files of class members. Dkt. # 169. Specifically, the order required Respondents to produce the

files for "noncitizens detained six months or longer in the Central District from April 21, 2011 [until on or about April 25, 2012] . . . and who spent a substantial portion of their time in the Central District." *Id.* For each A file, the Court ordered Respondents to produce "any document sent, given or otherwise delivered by a Petitioner to the federal courts, DOJ or DHS (including ICE, CBP and USCIS) and documents sent, given or otherwise delivered by those entities to a Petitioner . . . [as well as] Post-Order Custody Review ("POCR") worksheets and transcripts, if they exist, of any statements by detainees to DOJ or DHS officials, such as transcripts of removal hearings or CBP interviews."

9. Over the course of several months, Respondents produced A files of studied class members. Respondents, however, claimed to be unable to locate every document that should have been present in the A files subject to the order granting Petitioners' motion to compel. In some instances, many documents were missing from A files produced by Respondents, including documents pertaining to the April 2010-2011 period. For example, the 16 page A file of **[REDACTED]**, A# **[REDACTED]**, contains no information about his case from the last several years. The same is true of the 50 page file of **[REDACTED]**, A# **[REDACTED]**, and the 50 page file of **[REDACTED]**, A# **[REDACTED]**. In light of the obvious gaps in some of the A files, Petitioners sought and obtained written assurance from Respondents that the A files produced were the product of diligent searches, and that no further documents from those files could reasonably be located. True and correct copies of the letters be-

tween Respondents and Petitioners stipulating to that effect are attached as Exhibit 2.

10. In addition, in certain instances, Respondents intentionally withheld certain documents from A files. In particular, Respondents withheld discrete categories of documents and information from A files under color of certain statutory and regulatory confidentiality provisions. First, Respondents redacted all applications for relief under the Violence Against Women Act (VAWA), T visas (for victims of human trafficking), and U visas (for victim witnesses to certain other crimes). Second, Respondents redacted all asylum-related documents, including applications for asylum. Third, Respondents redacted certain other portions of the documents under color of various unidentified privileges.

11. Petitioners objected to many of the redactions and filed a motion to compel. Magistrate Judge Block initially upheld the redactions, but the District Court reversed the Magistrate's ruling in several respects. Dkt. #210.

12. In light of the delays already caused in obtaining A files from Respondents, rather than wait months for Respondents to produce unredacted versions of A files a second time, and for other reasons, the parties reached an agreement concerning how to proceed. The parties agreed that Petitioners could request a small number of A files containing asylum-related information, which Respondents would then produce in full; as for other files, Petitioners agreed that Respondents would not need to produce unredacted versions of documents concerning applications for relief under VAWA, the T visa, and the U visa.

True and correct copies of the correspondence between the parties memorializing this agreement are attached collectively as Exhibit 3.

13. At the same time, the parties stipulated that the records contained in the A files produced by Respondents are authentic and admissible pursuant to Federal Rule of Evidence 901, 803(6), and 803(8)—though the parties preserved the right to contest the trustworthiness of individual documents within A files. *See* Ex. 2.

RAP Sheets and Parole Worksheets

14. We also received a small amount of additional information that was relevant to the analysis that I describe here.

15. Respondents agreed to provide un-redacted copies of a small number of A files, the parties agreed that Respondents would supplement their production of the A files with, among other things, "RAP sheets" and "parole worksheets." RAP sheets contain in summary form government data about the criminal arrest and prosecution histories of individuals. Parole worksheets are forms that ICE officers prepare when determining whether or not to grant parole to detainees who request it.

Summary of Studied Class Members' A Files

16. The files of studied class members are voluminous. Very few of the A files produced by Respondents have fewer than 100 pages, and many of them contain more than several hundred or even a thousand pages. For that reason, pursuant to Rule of Evidence 1006, this declaration contains a summary of the contents of A files prepared based on a review I conducted

14. There is not currently an LOP program conducted at the Theo Lacy Facility. As a result, none of the Theo Lacy detainees have the opportunity to attend an LOP.

Immigration Court Mail

15. Based on my experience with detainees in the Central District, the Los Angeles Immigration Court sometimes sends detainees notices by mail, rather than by hand-delivery. Furthermore, it is my understanding that the Santa Ana City Jail distributes mail to detainees on Monday, Tuesday, Wednesday, and Thursday only. I regularly send mail to detainees at the Santa Ana City Jail and have found that, on average, it takes at least three business days for mail to reach the detainees.

16. Throughout my experience directly representing immigrant detainees in the Central District, as well as supervising the representation of such detainees, none of the detainees received notices from the Los Angeles Immigration Court translated into a language other than English. To the best of my knowledge, there is no procedure for requesting copies of written notices translated into a language other than English. The notices from the Department of Homeland Security ("DHS") are also generally in English, with the exception of what is known as an "Orantes" advisal notice, which is translated into Spanish. As a result, many detainees often have difficulty reading and understanding the notices they receive from the Court and DHS, especially when the detainees do not have the benefit of legal representation.

Immigration Case Processing

17. Based on my experience providing LOPs at the Santa Ana City Jail and the Musick Facility, I would estimate that detainees are on average scheduled for their first hearing in immigration court approximately 3 weeks after they are first detained. This first hearing is called a "master calendar" hearing. The only way an immigration case is typically resolved at the initial master calendar hearing is if the detainee agrees that he is removable as charged, waives his right to file any applications for relief and to appeal, and agrees to accept an order of removal.

18. If the detainee instead wishes to attempt to find legal representation or fight his immigration case—by arguing that he is not removable as charged or by filing an application for relief from removal—the case generally cannot be resolved at the initial master calendar hearing. In my experience, it typically takes at minimum one additional court hearing, but often several additional hearings, to reach a final resolution in the case. In cases in which the detainee wishes to apply for relief from removal, the immigration judge will typically provide a copy of the application for relief to the detainee at the first or second master calendar hearing and continue the case.

19. In my experience, the majority of detainees at the Santa Ana City Jail, Theo Lacy Facility, and Musick Facility do not have representation at their initial master calendar hearing. Based on my experience, many pro se detainees who are unfamiliar with legal practice or unable to speak or read English struggle to understand the steps necessary to file applications for

relief and other court procedures. When I encounter a detainee who I assess as having a strong defense to removal or claim for relief, I typically request that the detainee ask for a continuance to allow me time to recruit a pro bono attorney to represent them, or to locate and mail any relevant pro se guides or manuals to assist them with their case.

20. In my experience, detainees are typically provided with the Executive Office for Immigration Review's list of free legal services providers before or at the initial master calendar hearing. Additionally, immigration judges will typically ask pro se detainees at their initial master calendar hearing whether they would like an opportunity to obtain representation or legal assistance.

21. Based on my experience, continuances that provide detainees with time to find an attorney or to prepare their applications for relief are critical safeguards that ensure that pro se detainees are not rushed through a complex system that they may not understand without legal assistance or sufficient time to prepare. Because there are very few free legal resources available to detainees, and because immigration law is extremely complex, in my experience it can often take pro se detainees a significant amount of time to obtain legal assistance and prepare their defenses to removal or applications for relief. In such cases, it is often necessary for detainees to take multiple continuances to find an attorney or have sufficient time to prepare their cases pro se.

22. In cases where the detainee has filed an application for relief, the resolution of the case happens at a

"merits" hearing. In order to get to a merits hearing, the immigration judge must continue the case at least once because a merits hearing is never the first hearing scheduled in a case. Merits hearings are typically longer hearings than master calendar hearings and, in some cases, require judges to block off approximately a half day for the hearing. In my experience, there are typically longer delays in scheduling a merits hearing than a master calendar hearing.

23. Cases do not necessarily conclude at the first scheduled merits hearing. For example, the immigration judge's schedule may not permit sufficient time to hear all the evidence relevant to a detainee's application for relief from removal at the first merits hearing or there may be more than one merits hearing scheduled for the same time slot. In such cases, the immigration judge will continue the case and schedule another merits hearing. In my experience, asylum cases, for example, may require more than one merits hearing, and can require as many as four merits hearings.

Detainee Assistance

24. Through my LOPs, I often explain to detainees how to request bond hearings. In my experience, many detainees are unable to understand the regulations that govern bond hearings, and are often confused about their eligiblity for bond. During the past four and a half years, I would conservatively estimate that I have met with at least a dozen detainees who did not know they were eligible for a Casas hearing. I provided several of these detainees with pro se materials explaining how to request a Casas hearing.

25. Based on my observations and experience, I believe that a significant number of detainees give up meritorious claims and appeals because they cannot bear to stay in detention for the lengthy periods it may take to litigate their case. I have explained to detainees how to give up their cases and leave the country because they can no longer handle being in custody.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed at Los Angeles, California on Feb. 6, 2013.

/s/ TALIA INLENDER
TALIA INLENDER

Declaration of Cody Jacobs

I, CODY JACOBS, declare and state:

1. I am an Associate at Sidley Austin LLP and counsel of record for Petitioners in the above-entitled case. I have personal knowledge of each of the facts stated in this declaration and, if called to testify, I could and would testify competently as to each of them.

2. After Petitioners prevailed on discovery motions relating to A files and associated materials (Dkt. 169 & 210), Respondents produced documents bearing bates labels ICE-RPD-06654 to ICE-RPD-09804, which Respondents represented were the "rap sheets" of class members. These documents are voluminous —3,151 pages—and relate to 937 individuals. As a result, this declaration provides a summary based on a review of the rap sheets by myself and paralegals and legal support personnel working under my direction. We recorded the longest sentences of incarceration that appeared on the rap sheets produced by Respondents for each of the 937 individuals to determine which percentage had been detained for less than and more than 180 days.

3. According to the website for the Federal Bureau of Investigation (http://www.fbi.gov/about-us/cjis/background-checks, *visited on* February 4, 2013), a rap sheet or "Identification Record" "is a listing of certain information taken from fingerprint submissions retained by the FBI in connection with arrests and, in some instances, federal employment, naturalization, or military service. The process of responding to an Identification Record request is generally known as a

criminal background check. If the fingerprints are related to an arrest, the Identification Record includes name of the agency that submitted the fingerprints to the FBI, the date of the arrest, the arrest charge, and the disposition of the arrest, if known to the FBI. All arrest data included in an Identification Record is obtained from fingerprint submissions, disposition reports, and other information submitted by agencies having criminal justice responsibilities." A true and correct copy of a printout of that webpage is attached hereto as Exhibit A.

4. The rap sheets produced by Respondents contain lists of charges and, for each charge, a field called "DISPO," which contains information indicating the disposition of each charge (i.e., convicted, acquitted, etc.). Based on our review, when the rap sheets produced by Respondents referenced a conviction in the "DISPO" field, they also contained a field called "SEN," stating the length, if any, of the associated criminal sentence.

5. In order to prepare this summary, we recorded information from the rap sheets in the following manner:

a. So long as a rap sheet recorded a criminal sentence of incarceration of any length, we recorded the longest sentence of incarceration.

b. Where rap sheets contained dispositions described as convictions, but did not record sentences that included incarceration (e.g., probation), did not include any sentences at all, or only recorded "time served," the length of the longest sentence of incarceration was recorded as "0."

c. Where the only charges reflected on the rap sheets were immigration charges, and there were no dispositions recorded for those charges, the length of the longest sentence of incarceration was recorded as "0."

d. Where rap sheets did not record any criminal disposition of conviction (e.g., dismissal or acquittal), the length of the longest sentence of incarceration was recorded as "0."

6. In addition, to prepare this summary, we identified eighty (80) individuals for which rap sheets contained one or more non-immigration criminal charges, but did not record any dispositions for the criminal charges.

7. Below is our summary of the rap sheets:

a. Excluding the 80 individuals for whom the rap sheets did not include a single disposition record for criminal charges, 63% (544/857) of the individuals for whom rap sheets were provided had no criminal sentence longer than six months.

b. Including the 80 individuals for whom the rap sheets did not include a single disposition record for criminal charges, and assuming all of them had sentences longer six months, 58% (544/937) of the individuals for whom rap sheets were provided had no criminal sentence longer than six months.

8. Below are three exemplars of rap sheets Respondents produced for class members.

a. The rap sheet produced by Respondents for [**REDACTED**] contains a longest sentence of 30

days (associated with a charge of being under the influence of a controlled substance). According to the information produce by Respondents from immigration databases, **[REDACTED]** was in immigration detention for 646 days—***over a year and nine months***—before winning his case. A true and correct copy of the rap sheet produced by Respondents for **[REDACTED]** is attached as Exhibit B.

b. The rap sheet produced by Respondents for **[REDACTED]** contains a longest sentence of 90 days (associated with a charge of being under the influence of a controlled substance). According to the information produced by Respondents from immigration databases,[1] **[REDACTED]** was in immigration detention for 764 days—over two years—before winning his immigration case. A true and correct copy of the rap sheet produced by Respondents for Mr. [REDACTED] is attached as Exhibit C.

c. The rap sheet produced by Respondents for **[REDACTED]** contains a longest sentence of 90 days (associated with a charge of possession of a controlled substance with intent to sell). According to the information produced by Respondents from immigration databases, **[REDACTED]** was in immigration detention for 600 days—***over a year and seven months***—before winning his case. A true and correct copy of the rap sheet produced by Respondents for **[REDACTED]** is attached as Exhibit D.

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[1] The authenticity and admissibility of the voluminous information in the immigration databases is described in the concurrently-filed Declaration of Ahilan Arulanantham.

9. A true and correct copy of relevant portions of the deposition of Assistant Chief Immigration Judge Ivan Fong are attached as Exhibit E to this declaration. Respondents designated portions of this deposition as "confidential" under the protective order entered in this case.

10. A true and correct copy of relevant portions of the deposition of Assistant Field Officer Director Wesley Lee are attached as Exhibit F to this declaration. Respondents designated portions of this deposition as "confidential" under the protective order entered in this case.

11. A true and correct copy of the relevant portions of the deposition of Benjamin McDowell are attached as Exhibit G to this declaration. Respondents designated the entirety of this deposition as "confidential" under the protective order entered in this case.

12. A true and correct copy of the relevant portions of the deposition of Jennifer Sheriff are attached as Exhibit H to this declaration. Respondents designated the entirety of this deposition as "confidential" under the protective order entered in this case.

13. A true and correct copy of the relevant portions of the deposition of Sean Stephens are attached as Exhibit I to this declaration. Respondents designated the entirety of this deposition as "confidential" under the protective order entered in this case.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true

and correct. Executed this 8th day of Feb., 2013 at Los Angeles, California.

/s/ CODY JACOBS
CODY JACOBS

Exhibit E: Deposition of Thomas Y.K. Fong (excerpts)

Los Angeles, California

Tuesday, February 28, 2012

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[46]

the individual a danger to the community or a flight risk?

It is certainly unfortunate that anyone is held in detention any longer than necessary, but I don't normally see a correlation—I can't see one and I'm sure there probably might be an exception, but I can't see, in my view, whether prolonged detention has anything to do with whether someone is a flight risk or someone who maybe a danger to the community.

When I say that, if someone is going to be released within the next few days versus being held for a prolonged period, as some of the cases have discussed, is the person going to be a danger to the community whether he is released X number of days versus X number of months?

Unless there is some change in circumstances or material change, I don't see how prolonged detention would fall into that category. Is the person still going to be a danger to the community X number of months from now versus tomorrow, if I release them?

So that—I say to you, I don't think of that. Those to me are not—to me, prolonged detention is not an issue. It's—is he going to be, if released, a danger to the community or a flight risk.

BY MR. ARULANANTHAM:

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[57]

question.

THE WITNESS: I don't know.

BY MR. ARULANANTHAM:

Q If the release rate went up or down in any significant way, would you know about it?

MR. ATKINSON: Object to the form to the question.

THE WITNESS: No, I would not, and I have no interest in it even if I did find out.

BY MR. ARULANANTHAM:

Q Generally, again, when an immigration judge under your supervision or yourself is considering a release on bond, regardless of whether it's a Casas or a 236(a) bond hearing, is there any consideration by the immigration judge of alternatives to detention other than bond itself?

MR. ATKINSON: Object to the form of the question.

THE WITNESS: If I understand your question, are you referring to, for instance, what is the layman use ankle bracelets, you mean, versus something like that?

MR. ARULANANTHAM: Yes.

THE WITNESS: No. That is not our determination. Immigration judges do not have authority in that area to determine on what—what type of release [58] the alien is released on, only the amount of the bond, if any necessary, or whether it's versus—a mandatory detention versus a bond that can be set.

BY MR. ARULANANTHAM:

Q So if there were an individual who was eligible for release on bond, and in your view, a monetary bond wouldn't be sufficient to ensure that individual's appearance but released on an electronic monitoring device would be sufficient to ensure that person's appearance, what would you do in that situation? Would you order the person detained because there is no—because you can't order the electronic monitoring?

MR. ATKINSON: Object to the form of the question.

THE WITNESS: The only determination for a judge, again, is—I'm sorry to repeat myself—is can an appropriate bond ensure his—that he is not a flight risk, that he will appear for hearings and removal, if necessary, or a danger to the community.

We don't have any dealings with ankle bracelets or other forms of DHS custody release, nor do we have authority to issue one or to have one removed.

BY MR. ARULANANTHAM:

Q So in my hypothetical, where in your view there isn't a bond that will ensure the person's appearance,

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It is the third full paragraph that begins, "As explained below, the immigration judge may make a determination."

Do you see that?

A Yes.

Q Will you take a minute and read that paragraph and the next paragraph.

A All right.

Q Have you held Joseph hearings in any of the cases that you've sat on?

A Not that I can specifically recall.

Q Do you know if the judges that you oversee in the detained docket have held Joseph hearings?

A I do not know of a specific case, although I suppose it is possible. I assume it is possible.

Q But that's not something that you would track or find out about unless you got asked a question about it?

A Correct.

MR. ATKINSON: Object to the form.

THE WITNESS: Yes. Correct.

BY MR. ARULANANTHAM:

Q And you don't recall or do you recall a judge asking you any questions about a Joseph hearing?

A No.

Q So then—I'll just ask it. I think I know the

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[88]

detention, the judge's—what should the judge be analyzing to make that determination?

A Are you referring to Matter of Joseph now? Because when that term—

Q Yeah, Matter of Joseph.

A Matter of Joseph is limited to lawful permanent resident individuals, from my understanding. So I'm not sure whether you are referring to—or in the context of Matter of Joseph, or are you referring to it as a general proposition?

Q As a general proposition.

A Again, what I have always done is look at the Ninth Circuit board decisions that tell me, let alone reading the statute and regulations, what they give me as guidance.

There are certain case—certain cases that have specifically stated a specific violation of law is a mandatory detention. That was an easy one.

When it comes to the others, I have to interpret the statute and any case law that comes with it; does this fall into that category or is it one that appears to fall in that category.

Q Is there anything other than the person's criminal history which is relevant to that determination?

A From my understanding, it is not. If a [89] mandatory detention deals with a criminal conviction of some kind or kinds, the other factors are not relevant. It is the crime that's committed that, my understanding is, the mandatory detention issue upon—pursuant to the statutory language that is used.

Q As I understand it, some of the offenses which trigger mandatory detention do not render the respondent ineligible for cancellation or removal, but other ones do.

A That is my understanding, also.

Q And the fact that a detainee may be eligible for cancellation of removal would not be a basis, then, I take it, for finding that the mandatory detention does not apply?

A That is my understanding, also, of what has been prescient decision interpretation. The issue, though, is the statute and congressional mandate that indicates certain crimes require a mandatory detention by DHS. We are to review that—as immigration judges, our authority is to review that to ensure that is a proper determination by the government.

And obviously, that's the issue, but my understanding, it does not then—that they are not joined together. There's not a nexus or relationship between the statute that requires mandatory detention

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have an in-house interpreter, not a problem, translate it. If not, the individual would have to get someone to translate it for them.

When I say that, maybe it is an exotic language I don't—I can't read it. But I have had on occasion individuals who have actually had family members; although I'm cognizant there might be some self-interest, they are put under oath to translate honestly and faithfully as to what the document contains.

But that's for the bond hearing, as I said. It is a much more informal opportunity to present the case, because, again, it is a very serious issue under the statutes, the law, and our Constitution, an individual having the right to be released appropriately to defend themselves.

That even applies to an individual who is allegedly an alien unlawfully here or a permanent resident alien where the government is attempting to remove his status or lose his status.

Q Is ex parte evidence permissible in a bond hearing?

A No. No. The respondent should be there and has to be there.

Q Can the government put in evidence of the other side that the detainee isn't allowed to see or the [177] detainee's counsel is not allowed to see?

MR. ATKINSON: Object to the form of the question.

THE WITNESS: I cannot think of an instance that I have had.

BY MR. ARULANANTHAM:

Q Are you aware—

A I don't know why they would even try that.

Q Are you aware of it happening with any judge that you supervise?

A No, I'm not aware of it. I certainly would have said something if I had heard that. I wouldn't have to wait for the judge to come talk to me.

Oh, actually, let me correct one statement. There is a regulatory provision in terrorist cases where ex parte evidence can be presented to immigration judges because of national security or protection of informants. There is that rare exception.

Q But you are not aware of that ever happening in a case—

A Not in a regular Casas case or any type like that. I know it has occurred in terrorist cases, but that's rather rare. And even in that situation, it is rather carefully applied, I would think.

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Exhibit F: Deposition of Wesley J. Lee (excerpts)

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[16]

structure clear, who is below that?

A. The deportation officers.

Q. So just take, for example, a parole decision. Would that be made initially by a deportation officer?

A. The recommendation would be made by a deportation officer.

Q. And then who makes the final decision?

A. Right now I'd make the final—or AFODs make the final decision. I make my facility and there's other facilities within L.A.

Q. But does the supervisory deportation officer, the SDDO, make an initial decision as well?

A. They make a recommendation. There's three sign-offs: Deportation officer makes the recommendation; supervisory deportation officer makes one; and then the final is with the AFOD right now.

It used to be probably similar to—those that you see in there were made by the deputy. It used to be at the deputy level. It was delegated down.

Q. That's Tim Robbins delegated it to?

A. To the deputy field officer director.

Q. Okay. And then the deputy field officer directors in turn delegated it to the AFODs?

A. It was delegated to the deputy and now the [17] field office director delegated it down to AFODs.

Q. I see. Does that mean that you also then make the final decision with respect to POCR reviews for people detained in Mira Loma?

A. No.

Q. Who makes that?

A. Deputy field officer director.

Q. So with parole, you are the final decision-maker?

A. Yes.

Q. With POCR it goes one level above you?

A. Right. It's as far as it can be delegated down to the deputy, according to our policy.

Q. What about for Casas-Castrillon release decisions?

A. Casas decisions go to the deputy field office director.

Q. What about initial—just while we're here, since we're covering it—initial detention decisions?

A. The initial recommendation is by the arresting officer, whether it's an immigration enforcement agent or a deportation officer.

Q. And the final decision on whether to detain at the initial arrest stage is made by who?

[18]

A. Well, there's many levels of review, but a supervisor is the one that actually signs off on the recommendation. But it's reviewed after that.

Q. Okay. I guess in the other situations you've described, people below—for example, on parole—people below you are making a recommendation, but you're making the final decision?

MR. ATKINSON: Object to the form of the question.

THE WITNESS: I didn't understand.

BY MR. ARULANANTHAM:

Q. With parole recommendations, with parole decisions, as you have described it—and tell me if I'm wrong—people below you make the recommendation, but you make the final decision?

A. On paroles, yes.

Q. So with respect to the initial detention decision, who is analogous to you?

A. Say that again.

Q. Who is analogous to you? Who makes the final decision with respect to initial detention?

A. Initial—

MR. ATKINSON: I'm sorry. Give me a second to get my objection in.

Object to the form.

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[33]

reviewed and what their rights are. And there is a paragraph where they describe the, maybe, criminal history and the flight risk. And it ends up with that they can go to the Immigration Judge.

So is it boilerplate? It definitely has some language in it for every detainee because it's all the same language.

Q. Would you say it's less detailed than a POCR decision but more detailed than 236(a) decision?

MR. ATKINSON: Object to the form.

THE WITNESS: I would say it is less detailed than a POCR decision, yes.

BY MR. ARULANANTHAM:

Q. What about parole decisions, is there a comparable policy that boilerplate write-ups are unacceptable for parole decisions?

A. I've never seen that in a policy.

Q. What's your view about it?

MR. ATKINSON: Object to the form.

THE WITNESS: The parole determination is—it's done on different type of individual. It's really done on asylum seekers who come in. And 99, probably, .9 percent of them have no criminal history so we're really not looking at that type of stuff that we would look at on a 236(c) or Post-Order Custody

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[40]

You can answer

THE WITNESS: On criminality I don't really know if there's been any tracking crimes that were committed by people that were released because we thought they weren't going to be a danger. Definitely there would be some statistics on people that were released because we didn't think they were going to be a flight risk and were a flight risk.

BY MR. ARULANANTHAM:

Q. Have the custody decisions changed over time to reflect information about the absconder rate for people who are released and then found to be a flight risk?

MR. ATKINSON: Object to the form of the question on the same basis and on other bases.

You can answer.

THE WITNESS: I think the custody decision really has always been the same. It's just—it's really just been how much bed space you have. Like I say, you're allocated "x" amount of dollars. I mean definitely our department is an enforcement arm for immigration law, so that is what we do, that's what the taxpayers pay us for.

So, you know, we—definitely if we had the funding, I think the mission would be that we're [41] funded for, to enforce immigration laws. So I don't really —I don't think anything has changed since I was in in '88. The same people were being released back then

because of not enough resources as are being released today because of not enough resources.

BY MR. ARULANANTHAM:

Q. Except that, I suppose, as the bed capacity—because the bed capacity has increased dramatically since 1988; right?

A. Definitely. So has the immigration problem.

Q. Right. So in that sense the number of people that you're detaining, the raw number of people, has gone up?

A. I would hope so, since the program has gone way up.

Q. On the same topic about change or lack thereof in custody determination decision-making, if, for example, at a Casas hearing case ICE decides to keep the person detained but then the Immigration Judge redetermines that and orders the person released on bond, does that decision, the fact that the Immigration Judge reached a different decision—does that get back to the ICE officers?

A. Yes. Like I say, the judges are at our facilities. So, you know, the officers are working * * *

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are there spellings or anything that you need right now while we have a moment?

THE REPORTER: I can't think of anything at the moment.

MR. ARULANANTHAM: If you can spell my name it's all downhill from there.

Q. Who is eligible for release on parole?

A. Who is eligible?

Q. Yeah.

MR. ATKINSON: Object to the form.

THE WITNESS: Just generally?

BY MR. ARULANANTHAM:

Q. Yeah.

A. An arriving alien would be eligible.

Q. So when someone comes into your custody, meaning into the ICE field office custody, how do they know—how does ICE know this is a person who is parole-eligible as opposed to, you know, one of the other categories?

MR. ATKINSON: Object to form.

THE WITNESS: Well, 99 percent of our cases that come in that would be eligible for parole have come in at a port of entry and have claimed they were, you know, put into expedited removal and then claimed a credible fear and were referred to ICE to see an [98] asylum officer. So it kind of triggers it for us.

BY MR. ARULANANTHAM:

Q. If a person is coming over the land border in San Diego, then they would have gone through that process before they got to the L.A. field office; right?

A. True.

Q. So how then when they get to the L.A. field office do you know that they're parole eligible as opposed to detainees who would be subject to 236(a) or some other process?

A. Their paperwork comes with them.

Q. So someone reviews—someone in the L.A. field office reviews that paperwork after they arrive?

A. Yes, they do.

Q. Tell me about that. How does that process work?

A. Most of the Los Angeles field office's detainees come through staging at our office downtown. So especially if they're coming from San Diego, they would come downtown. And the officers there would review the cases before they send them out to the detention facilities. And then they're reviewed again once they get out to the detention facilities.

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[100]

BY MR. ARULANANTHAM:

Q. Right. And obviously if someone's caught at LAX, then the credible fear interview would typically also happen in Los Angeles; right?

A. I would say yes.

Q. The standard for release on parole—does it also include danger and flight risk? Is that right?

MR. ATKINSON: Object to the form.

You can answer.

THE WITNESS: Yes. It's identity. It's your identity and flight risk and it does have danger to the community, yes.

BY MR. ARULANANTHAM:

Q. Are there other factors involved in the parole detention decision which are different from the 236(a) detention decision?

You said identity, danger, flight risk. Is there anything else?

A. There's actually a lot of factors that go into that decision. But, yeah, that's kind of pretty much what we look at: Danger, the criminal history or—well, both of them can include national security concerns.

Q. I'm going to hand you what we will mark as Exhibit 5.

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[106]

(Recess taken.)

MR. ATKINSON: Okay. Sorry.

BY MR. ARULANANTHAM:

Q. If, for example, the address didn't check out, that's not something that the officer would write in the parole denial; right?

A. In the—

Q. That's not something that the officer would write down in the parole denial typically?

MR. ATKINSON: Object to the form of the question.

THE WITNESS: This decision letter has changed. It's a little bit more detailed now, so there are more checked boxes. So there may be a checked box on there that says they haven't provided an address in the U.S.

BY MR. ARULANANTHAM:

Q. But other than what the checked boxes provide, the officers don't write other explanations for the denial; for the parole denials; is that true?

MR. ATKINSON: Object to the form of the question.

THE WITNESS: The decision that the detainee gets is just the decision letter. Like I say, the decision letter has been changed. Once policies come [107] out, things change when you see that they need to be changed.

So now it—the decision letter is still a checked box, but it definitely has a little bit more—it's broken down in more details so it gives them an opportunity. But they're interviewing these people so the decision letter might not go into detail. But definitely the detainee knows what the issues are unless they're of a national security concern.

BY MR. ARULANANTHAM:

Q. So the detainee might orally hear more about why they're being denied parole. But I'm only asking again because I don't think you actually answered my question kind of precisely, although I understood what

you said, that any explanation other than the checking of the boxes would not appear in the decision letter; is that correct?

A. There's another decision letter besides this one—

Q. Right.

A. —but the checked boxes that are on there is all we're doing right now. That's our procedure.

Q. There's no other document that is in the file that explains the decision beyond the decision letter; [108] is that correct?

MR. ATKINSON: Object to the form.

THE WITNESS: There will be officer notes, yeah.

BY MR. ARULANANTHAM:

Q. But those are—that's not something that a detainee would see or that anybody outside of ICE would see; is that right.

A. It's not.

Q. That's going to look funny on the record.

When you say it's not, you mean it isn't anything—no one else will see that; is that correct?

A. It's law enforcement privileged. I don't think anybody will see it.

Q. Is the danger standard used—actually strike that question.

You had said earlier that information might come to you about a detainee through the JTTF?

A. Yes.

Q. How often does that happen in a parole decision?

[REDACTED]

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[118]

THE WITNESS: I would assume that if they discovered something that needed to be changed, they would notify the field to make that change. That's probably why they made the one change on the decision letter.

BY MR. ARULANANTHAM:

Q. If everything else were fine, you would know that too?

MR. ATKINSON: Object to the form.

THE WITNESS: I would only know what they tell me.

BY MR. ARULANANTHAM:

Q. How officers are trained in making parole determinations?

A. I would say it starts at the academy, and then as you go through your career you'll get updated training throughout, depending on what office you're in and what unit you're in as the frequency of that training.

When this new policy came out, there was training with this new policy. It changed our parole a little bit.

Q. Right. You said earlier that each parole packet, set of documents, gets sent to headquarters. That's not for the purpose of headquarters deciding to [119] change that decision; is that right?

A. That's correct, it's not. It's for the analysis.

Q. So is it—or have you ever seen a decision that was made at the field office level get changed by people at headquarters with respect to parole?

A. I have not.

Q. Do you know if that ever happens?

A. I haven't seen it.

MR. ARULANANTHAM: We can stop for lunch.

MR. ATKINSON: That's a good idea.

MR. ARULANANTHAM: I'm not quite done with parole stuff, but why don't we stop.

(The luncheon recess was taken at 1:02 P.M.)

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we don't have a lot of information on criminal history on somebody that's arriving where it's the first time they've been in the U.S., so we don't really know whether they're a danger or not because we don't have any information on them basically. So it is different.

BY MR. ARULANANTHAM:

Q. Please forgive me if I've asked these questions before, I just couldn't remember from my notes.

The length of detention, both past and future, the past detention and the likely future detention—are those factors you consider in parole decisions?

MR. ATKINSON: Object to form.

THE WITNESS: They would not be.

BY MR. ARULANANTHAM:

Q. I would imagine once in a while there are people who are—have some immigration status who are returning and then get subject to the parole custody determination process. Is that true?

MR. ATKINSON: Object to the form.

THE WITNESS: Say that again.

BY MR. ARULANANTHAM:

Q. You said earlier that most of the people

* * * * *

[128]

type cases, if they're not released on parole, it's—the largest percentage is because they don't have a place to go, they don't have a sponsor, they have nowhere to go.

At the POCR process that's not a consideration. If we can't remove them, we have to release them.

MR. ATKINSON: Sorry. Hang on a second. Hold on a minute. I'm sorry.

(Discussion held off the record.)

BY MR. ARULANANTHAM:

Q. Earlier I showed you the parole policy.

MR. ATKINSON: You mean Exhibit No. 6?

MR. ARULANANTHAM: It may be marked as Exhibit 6.

THE WITNESS: I got it.

BY MR. ARULANANTHAM:

Q. If you go to page—it's ICE page 26. Look at Paragraph 8.2. It says in the fifth line that the officer, DRO officer, must conduct an interview with the alien to assess his or her eligibility for parole. Do you see that?

A. Yes.

Q. I think earlier you said you do do it and you weren't sure if it was policy that you had to or not.

* * * * *

[175]

mechanism for you to catch it?

A. When I review them, I just review from the A-File and the documentations they use. I don't go into any systems when I'm reviewing.

Q. Let's say that the detainee had told the deportation officer in an informal interview that he did have employment prospects but the deportation officer wrote "None," and there's no written indication of the detainee's statement to the officer.

Is there any way for you to catch that mistake?

A. There's no way.

Q. Go to the page that at the bottom is marked 77. It's in the same exhibit.

A. Seventy-seven?

Q. But it's further down. Second-to-last page. I don't know what happened.

A. Okay.

Q. Do you see the box there, "Officer Comments/Analysis & Recommendation"?

A. Yes.

Q. So I'm going to generalize about the five, six paragraphs that are here. Let me know if you agree with this characterization. It says that—or strike that.

* * * * *

[207]

A. Yes.

Q. And to prepare for this deposition you familiarized yourself with the positions of—the positions of and the information available to Immigrations and Customs Enforcement and Department of Homeland Security in order to be able to testify about those topics; is that correct?

A. I would say, yes, I did familiarize myself.

MR. ATKINSON: We just want to make one notation on the record: That we had originally designated Mr. Lee with respect to eight and nine just to speak for the department with respect to notification provided to persons eligible for such hearings, but we

understand the scope went beyond that and—which is fine.

MR. ARULANANTHAM: Then to that end actually, let me just clean this up and ask that one question then.

Q. Once a detainee has been determined to be subject to mandatory detention under 236(c), are they given notice of that?

A. Yes.

Q. How?

A. It's on the custody determination.

Q. On the sheet it says what?

[208]

A. It's a checked box that says you've been determined to be a mandatory detention. I don't think it specifically says 236(c), but—

Q. Is the detainee informed of any ability to seek redetermination of that determination?

A. On 236(c)? No.

MR. ARULANANTHAM: Can we go off the record for one second?

MR. ATKINSON: Sure.

(Discussion held off the record.)

BY MR. ARULANANTHAM:

Q. Does the detainee have the opportunity to argue to ICE that he's not subject to mandatory detention?

A. Does he have the opportunity to?

Q. Yes.

A. He can argue that to the officer that's writing him up. I don't know—on the custody determination if we're going to place him them 236(c) mandatory detention because we believe the crime places them there, there's a check box on there that says they're mandatory detention. And there are little check boxes on the form if you guys have a copy of one. And if they're not 236(c), it has on there that you have a right to, you know, an immigration [209] hearing with an IJ, Department of Homeland Security.

On that particular one if we determine they're 236(c), it says they cannot have a bond hearing.

Q. You said the detainee can argue with the officer who's writing him up?

A. Yeah.

Q. Is there an interview? Or how does that happen?

A. There's an interview done between the detainee and the arresting officer, even if it's at a detention facility, and we have 287(g) there, and there's discussion about, you know, what are your crimes; and then they'll be verified and they'll discuss their—why they're being charged and then they'll sign their notice to appear and their custody determination.

So definitely you're talking to the detainee in a large majority of the cases. There are instances where you may not. An NTA may be written up without talking to the detainee.

Q. This is the same decision—the process that you're talking about now when the officer is talking to the detainee—that's the same time when the officer is deciding whether the person is going to be * * *

* * * * *

[243]

Q. In fact, at Mira Loma you have approximately 800 beds that are not currently filled; is that correct?

A. That's correct.

MR. ARULANANTHAM: Objection to form.

MR. ATKINSON: Did you get his answer?

THE REPORTER: Yes.

MR. ATKINSON: Okay.

No further questions.

MR. ARULANANTHAM: I have one question. Do you have any?

MR. KAUFMAN: No.

EXAMINATION (CONTINUING)

BY MR. ARULANANTHAM:

Q. Earlier when we spoke about a notice for detainees subject to mandatory detention, you said that the Notice of Custody Determination form says on it that you cannot get a review by an Immigration Judge if you're subject to mandatory detention; is that correct?

A. Yes.

MR. ARULANANTHAM: Nothing else.

MR. ATKINSON: We're going to read and sign the deposition.

Declaration of Michael Kaufman

I, Michael Kaufman, hereby declare:

1. I am a staff attorney at the American Civil Liberties Union of Southern California and counsel of record for Petitioners in the above-entitled certified class action ("*Rodriguez*"). I make this declaration based on my own personal knowledge and if called to testify I could and would do so competently as follows:

Overview

2. During the course of discovery in *Rodriguez*, Respondents produced information about class members from government databases maintained by the Executive Office for Immigration Review ("EOIR") and Immigration and Customs Enforcement ("ICE"), as well as portions of A-files, for 1,026 people Respondents represented were class members. These individuals are referred to as the "studied class members." Specifically, Respondents represented that the information pertains to noncitizens detained six months or longer in the Central District from approximately April 21, 2011 until approximately April 21, 2012 who spent a substantial portion of their time in detention in the Central District. Petitioners received several "shipments" of data about those individuals, including one on or about August 12, 2011 and another updated one on or about October 11, 2012. Petitioners also received A files for those individuals over the course of several months, although the files were never updated.

3. The parties have stipulated that the A files produced by Respondents are authentic under Rule 901 of the Federal Rules of Evidence, and, absent a challenge

to the reliability of a specific document, admissible under either or both Rule 803(6) and Rule 803(8) of the Federal Rules of Evidence. True and correct copies of letters between the parties memorializing this stipulation are attached as Exhibit 2 to the Declaration of Ahilan Arulanantham.

4. Representatives of Respondents testified at deposition that information in the government databases produced to Petitioners is reliable and relied upon by Respondents in the course of their regularly conducted activities. *See* Deposition of Sean Stephens at 21:24-22:14 (attached as Ex. I to the Declaration of Cody Jacobs); Deposition of Jennifer Sherriff at 14:14-15:1 (Jacobs Decl. Ex. H); Deposition of Benjamin McDowell at 152:17-153:5 (Jacobs Decl. Ex. G).

5. Respondents produced to Petitioners database information and A file documents related to approximately 1,026 individuals who Respondents represented that they do not maintain database information specifically identifying the detention statute pursuant to which they detain class members (or other detainees). As Government counsel Theodore Atkinson stated in correspondence to us, "Respondents do not maintain electronic records of the detention statute that authorizes or authorized detention." A true and correct copy of that letter, dated March 17, 2011, is attached to the Declaration of Ahilan Arulanantham as Exhibit 1.

6. In the following paragraphs, I explain how we determined from the information and documents produced by Respondents which individuals fell within certain subclasses, and how we determined which indi-

viduals do not qualify as class members, notwithstanding that Respondents produced their information to us.

Identifying Individuals in the 1225(b) Subclass

7. The Section 1225(b) subclass includes people who are arrested at a port of entry "seeking admission" to the United States and are detained under 8 U.S.C. § 1225(b) ("Section 1225(b)"). The government decides the custody status of Section 1225(b) subclass members through the parole process, an administrative review conducted by ICE officials.

8. To identify individuals in the 1225(b) subclass, we determined whether the A files contained parole worksheets. A parole worksheet is a standard form used by ICE to determine the custody status for individuals detained under Section 1225(b). The presence of a parole worksheet in an A file evidences that an individual has been detained under Section 1225(b).

9. We tested the accuracy of our method for determining membership in the Section 1225(b) Subclass through actual review of a sample of the files of individuals we had identified through this method. That review confirmed that the individuals with parole worksheets in their files were members of the Section 1225(b) subclass.

10. Pursuant to a discovery agreement memorialized in a June 4, 2012 letter from Mr. Atkinson to Mr. Arulanantham, Respondents produced parole worksheets for approximately 68 individuals. In a March 23, 2012 letter, counsel for Respondents represented that these parole worksheets were located within the 1,026 A files based on reasonably diligent and reliable

searches. For purposes of the data summarized below, these individuals have been categorized as members of the Section 1225(b) subclass.

11. True and correct copies of the June 4, 2012 and March 23, 2012 letters from Respondents' counsel are attached hereto as Exhibits A and B.

Identifying Individuals in the 1226(c) Subclass

12. The Section 1226(c) subclass includes people who are subject to mandatory detention under 8 U.S.C. § 1226(c).

13. To identify individuals in the 1226(c) subclass, we needed to consult two pieces of information within database information and A files produced by Respondents. First, we consulted a field within the EOIR Access database produced by Respondents on October 14, 2011 that identifies the statutory provisions under which an individual was charged as removable. We compared the charges listed in the EOIR database for each class member with the charges that qualify as mandatory detention offenses, as provided in 8 U.S.C. § 1226(c)(1). Individuals that had been charged with a mandatory detention offense were detained pursuant to Section 1226(c) at some point during their detention. In the March 17, 2011 letter from Mr. Atkinson to Mr. Arulanantham, Respondents confirmed "the charge against the alien (from EOIR)" could be used to "identify whether the detainee is/was held under mandatory detention."

14. Second, we reviewed the EOIR database for records evidencing whether these individuals were detained under Section 1226(c) at any point after they

had been detained for at least six months (because the statutory authority for detention in certain circumstances can change over time). For example, individuals charged with a mandatory detention offense can prevail on a challenge to their removability on that ground, or the government can withdraw the charge against them. In both cases, the individual would no longer be detained under Section 1226(c) after the mandatory detention charge was dismissed or withdrawn. To account for these possibilities, we looked at whether any of the individuals with 1226(c) offenses had a bond hearing prior to being detained for six months. If an individual had a bond hearing, we could reasonably assume that the government did not treat them as detained under Section 1226(c) when he or she became a class member (that is, when their detention exceeded six months). Conversely, if they had a Section 1226(c) charge and did not have a bond hearing prior to six months, we could reasonably assume that they were Section 1226(c) subclass members.

15. To determine whether class members had bond hearings prior to six months of detention, we relied on information contained in the ICE and EOIR databases. This analysis was conducted by a volunteer attorney, Fatima Alloo, under my direction and supervision. We first determined the initial date of detention for class members by consulting the ICE spreadsheet, which contains the book-in dates for class members. We then calculated the date on which an individual qualified as a class member by adding 180 days to the book-in dates.

16. We then exported information from the Bond Table and Case Table Date from the EOIR Access

database. Because the Bond Table identifies detainees by reference to a number known as an IDN case number rather than an A#, we used the Case Table (which contains both IDN case numbers and A#s) to match the information from the Bond Table with the information drawn from the ICE database. We were then able to create a spreadsheet that contained the names, A#s, book-in dates and 180-day dates drawn from the ICE database, and the bond hearing date, decision, "initial bond" and "new bond" amount information drawn from the EOIR Access database. We then analyzed the dates for when each bond hearing occurred, and removed the people who had bond hearings within their first six months of detention. Where the data was ambiguous, we consulted detainee files to confirm whether a bond hearing had occurred (or if, as the data occasionally indicated, the detainee had made an appearance before an immigration judge but the judge had determined that he or she lacked authority to release the individual because he was subject to mandatory detention). The resulting list contained 464 unique individuals whom we categorized as falling within the 1226(c) subclass.

17. That number, which reflects that roughly half of the class are subject to 1226(c), is consistent with my and my co-counsel's experience in interviewing large numbers of class members over the course of the last several years.

18. We tested the accuracy of our method for determining membership in the Section 1226(c) Subclass through actual review of a sample of the files of individuals we had identified through this method. That review confirmed that the individuals we identified had

been subjected to mandatory detention and were members of the Section 1226(c) subclass. Several of the individuals selected from the sample are described in the "mandatory detention" section of Mr. Arulanantham's declaration.

Identifying Individuals in the 1231(a) Subclass

19. Section 1231(a) subclass members include people who have an administratively final order of removal, but who continue to litigate their removal cases either through filing a motion to reopen ("MTR") or some other mechanism.

20. We made several unsuccessful attempts to identify the Section 1231(a) subclass members. We first consulted information in the Applications Table in the EOIR database, as well as information in class members' A files, to determine which class members had filed MTRs. We next looked for information in the database that evidenced the individual was: (1) someone who filed an MTR to challenge a final order after they had been detained for 180 days; (2) someone who filed an MTR before the 180-day mark, but whose MTR remained pending after 180 days; or (3) someone whose MTR was denied prior having been detained 180 days, but who had appealed and received a stay of removal, and the appeal remained pending after 180 days.

21. Despite investing significant time and effort to identify individuals within the Section 1231(a) subclass using these and other methods, we concluded that the information produced to date by Respondents during discovery does not provide a reliable, formulaic way to identify persons within the Section 1231(a) subclass

the way we could for the 1225(b) Subclass and 1226(c) Subclass. Our conclusion was based on a variety of reasons, including because the database information regarding motions to reopen and stays appears to be inconsistent and incomplete.

Identifying Individuals Who Do Not Fit Within The Subclasses

22. Based on the information produced by Respondents, 83 of the 1,026 people that Respondents identified as class members do not, in fact, appear to be class members for one or more of three reasons: (1) they had not been detained for more than 180 days; (2) their removal cases had completed, and they had no active removal proceedings during the entire time of their detention, even though they were detained longer than 180 days; and (3) they had active removal cases during their detention, but their cases completed prior to their 180th day of detention.

23. The EOIR and ICE database records for 2 of the 1,026 people identified by Respondents as class members evidence that they spent less than 180 days in detention. Those individuals have not been considered class members for purposes of this analysis, or the analysis of Petitioners' expert, Dr. Susan Long.

24. The EOIR and ICE database records for 24 of the 1,026 people identified by Respondents as class members do not appear to contain any evidence of active court proceedings, at any level, during the course of their detention. Those individuals have not been considered class members for purposes of this analysis, or the analysis of Petitioners' expert, Dr. Susan Long.

25. In light of these discoveries, we also examined the database records to determine if they included individuals who had been detained more than 180 days in detention, but who had no active removal proceedings after their 180th day of detention. To determine this from the database, we compared the dates of detainees' 180th day of detention to the dates on which their cases completed. If a detainee's case was completed prior to the 180th day of detention, then he or she did not qualify as a class member because he or she was not in active removal proceedings after the 180th day of detention. The EOIR and ICE database records for 57 of the 1,026 people evidence met that criteria, and thus those individuals have not been considered class members for purposes of this analysis, or the analysis of Petitioners' expert, Dr. Susan Long.

Detention Center and Immigration Court Information

26. I am familiar with the conditions in the immigration detention centers and case processing for detained immigrants through my first-hand experience and communication with immigration detainees, attorneys and legal service providers, and ICE officials. During the past two and a half years, I have spent extensive time visiting immigration detainees in the Mira Loma, Adelanto, Theo Lacy, Santa Ana and Musick detention centers. I have also been on "tours" allowing me to inspect the interior portions of Mira Loma, Adelanto, and Musick detention centers, and on separate occasions, have also been to the interior portions of Mira Loma and Adelanto in order to conduct presentations. I would conservatively estimate that I have met with at least 100 detainees in these facilities. I also communicate regularly with detainees at these

facilities by letter and by phone. In addition, I regularly communicate with immigration attorneys and legal service providers who have clients or provide services in these detention centers, as well as ICE officials who oversee these facilities, regarding conditions at the detention centers and issues related to individual detainees' cases.

27. Based on my experience, I believe the bed space capacity for the Adelanto, Theo Lacy, Musick and Santa Ana City Jail facilities is approximately 2,100-2,500.

28. A true and correct copy of an email dated September 11, 2012, from Department of Justice attorney Victor Lawrence to my co-counsel Ahilan Arulanantham is attached as Exhibit O. The email reports that, in 2012, the average daily population for the Los Angeles-area facilities is as follows: Theo Lacy (448); Musick (228); and Santa Ana (190). ICE officials have informed me that, following the closure of the Mira Loma facility and the subsequent transfer of many of its detainees to Adelanto, the Adelanto facility is currently operating near or at its bed space capacity of approximately 1,200-1,300.

29. Based on my experience, I believe that there are currently at least five immigration judges in the Los Angeles Immigration Court who hear detained cases regularly or exclusively. In addition, based on the deposition testimony of Assistant Chief Immigration Judge Fong in this case, I understand that additional immigration judges may hear detained cases or hearings when there is a substantial backlog on the detained docket. Since approximately November 6,

2012, counsel for Respondents Sarah Wilson has provided to me the hearing notices for bond hearings conducted pursuant to the preliminary injunction order in this case. Based on my review of the hearing notices and my personal experience attending several *Rodriguez* bond hearings in the past two months, I believe that bond hearings conducted pursuant to the *Rodriguez* preliminary injunction since November 6, 2012 have been heard by the five judges who ordinarily hear detained cases.

Reinstatement and Visa Waiver Cases

30. In the course of the parties' meeting and conferring pursuant to Local Rule 7-3 with respect to the instant motion, counsel for Petitioners informed Respondents that they intend to move for summary judgment on behalf of all class members, including individuals who have a prior final order of removal reinstated and are in withholding-only proceedings ("reinstatement cases"), and individuals who were admitted to the United States through the visa waiver program and are in asylum-only proceedings ("visa waiver cases"). On January 24, 2012, I spoke by phone with counsel for Respondents, Theodore Atkinson and Sarah Wilson, along with my co-counsel Ahilan Arulanantham, as part of the parties' meet and confer meetings. Mr. Atkinson stated that Respondents would oppose Petitioners' motion with respect to reinstatement and visa waiver cases on the ground that, in Respondents' view, the class definition applies only to people in removal proceedings under 8 U.S.C. 1229a, and that individuals detained pending adjudication of their reinstatement and visa waiver cases fell outside the class definition because they are not in "removal

proceedings" conducted under Section 1229a. In that conversation, we informed Mr. Atkinson that we would seek an order from the Court specifying that those individuals are class members entitled to the same relief as other class members.

Cost of Immigration Detention

31. In its "Annual Performance Report" published on February 13, 2012, the Department of Homeland Security ("DHS") estimated that the average daily cost for a bed space at an immigration detention center is $122. A true and correct copy of excerpts of the DHS "Annual Performance Report" is attached hereto as Exhibit C.

32. According to Dr. Long's Expert Report, the studied class members were detained for approximately 184,067 aggregate days during the year following their 180th day in detention. Based on the average daily cost of bed space as reported by DHS, approximately $ 22,456,174 was spent on detaining the studied class members during the year following their 180th day in detention. This significantly underestimates the total cost over time of detaining class members because, as Dr. Long explains in her Expert Report, many class members are detained for more than 18 months.

33. According to Dr. Long's Expert Report, the average period of incarceration for studied class members who won their cases was 342 days, and 509 days for the studied class members who won after proceedings at the BIA. Based on the average daily cost of bed space as reported by DHS, the average cost of detaining the studied class members who won their

cases was approximately $ 41,724 per person. If such individuals had been released after their 180th day of detention, the cost savings to the government would have been approximately $ 19,764. For class members who won after proceedings at the BIA, the average cost was $ 62,098 per person. If such individuals had been released after their 180th day of detention, the cost savings to the government would have been approximately $ 40,138.

Documents

34. A true and correct copy of the "ISAP II Annual Report—Contract Year 2010" by BI Incorporated is attached as Exhibit D. The document was produced by Respondents in discovery in this matter.

35. A true and correct copy of the "ISAP II Annual Report—Contract Year 2011" by BI Incorporated is attached as Exhibit E. The document was produced by Respondents in discovery in this matter.

36. A true and correct copy of a memorandum dated February 28, 2011 and entitled "Alternatives to Detention Program Participant Enrollment Guidance" by Gary Mead is attached as Exhibit F. The document was produced by Respondents in discovery in this matter.

37. A true and correct copy of a table entitled "Median Time Intervals for Merit Terminations of Administrative Agency Appeals" from the report entitled "Judicial Business of the United States Courts 2011" is attached as Exhibit G.

38. A true and correct copy of excerpts of a report entitled "Executive Office for Immigration Review FY 2011 Statistical Yearbook" is attached as Exhibit H.

39. A true and correct copy of excerpts of a report entitled "Pretrial Release and Misconduct in Federal District Courts, 2008-2010" by U.S. Dep't of Justice—Bureau of Justice Statistics is attached as Exhibit I.

40. A true and correct copy of excerpts of the "Immigration Court Practice Manual" by the Office of Chief Immigration Judge, Department of Justice is attached as Exhibit J.

41. A true and correct copy of "Respondents' Answers To Plaintiff's First Set Of Requests For Admission To Respondent Department Of Justice" is attached as Exhibit K. The document was produced by Respondents in discovery in this matter.

42. A true and correct copy of "Expert Statistical Report of Dr. Chester I. Palmer" is attached as Exhibit L. The document was produced by Respondents in discovery in this matter.

43. A true and correct copy of "Rebuttal Expert Statistical Report of Dr. Chester I. Palmer" is attached as Exhibit M. The document was produced by Respondents in discovery in this matter.

44. A true and correct copy of a sample letter regarding "Custody Status Review" is attached as Exhibit N. The document was produced by Respondents in discovery in this matter.

I declare under penalty of perjury of the laws of the State of California and the United States that the fore-

going is true and correct to the best of my knowledge and belief. Executed this 8th day of Feb., 2013 in Los Angeles, California.

/s/ MICHAEL KAUFMAN
MICHAEL KAUFMAN

Exhibit C: U.S. Department of Homeland Security Annual Performance Report

Fiscal Years 2011-2013

[SEAL OMITTED] Homeland Security

Our Vision

A homeland that is safe, secure and resilient against terrorism and other hazards.

About this Report

The U.S. *Department of Homeland Security Annual Performance Report for Fiscal Years (FY) 2011 - 2013* presents the Department's performance measures and applicable results, associated performance targets for FY 2012 and FY 2013, and provides information on the Department's Priority Goals.

For FY 2011, the Department is using the alternative approach—as identified in the Office of Management and Budget's Circular A-136—to produce its Performance and Accountability Reports, which consists of the following three reports:

- ***DHS Annual Financial Report***: Publication date - November 11, 2011.
- ***DHS Annual Performance Report***: Publication date—February 13, 2012. The *DHS Annual Performance Report* is submitted with the Department's Congressional Budget Justification.
- ***DHS Summary of Performance and Financial Information:*** Publication date—February 13, 2012.

When published, all three reports will be located on our public website at:

http://www.dhs.gov/xabout/budget/editorial_0430.shtm.

For more information, contact:

Department of Homeland Security
Office of the Chief Financial Officer
Office of Program Analysis & Evaluation
245 Murray Lane, SW
Mailstop 200
Washington, DC 20528

Information may also be requested by sending an email to par@dhs.gov or calling (202) 447-0333.

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Appendix A: Measure Descriptions and Data Collection Methodologies

Appendix B: Program Evaluations

Department of Homeland Security
U.S. Immigration and Customs Enforcement
Salaries and Expenses
Justification of Program Changes
(Dollars in Thousands)

Program Decrease 3: Reduction in Detention Beds to 32,800
PPA: ERO - Custody Operations
Program Decrease: Positions 0, FTE 0, Dollars $(53,436)

Funding Profile

	FY 2011 Actual Obligations			FY 2012 Enacted Budget Authority			FY 2013 Requested Budget Authority		
	Pos	FTE	Dollars ($000)	Pos	FTE	Dollars ($000)	Pos	FTE	Dollars ($000)
Current Services Level	[redacted]								1,514,020
Program Decrease									(53,436)
Total Request	-	-	1,456,825	-	-	1,514,020	-	-	1,460,584

Description of Item

The Budget reduces ICE detention capacity to 32,800 detention beds. ICE will prioritize the detention of criminal aliens and those who fall into other priority categories including repeat immigration law violators, recent border entrants and immigration fugitives in FY 2013. As ICE continues to focus on criminal and other priority cases, the agency also anticipates reducing the time removable aliens spend in detention custody.

While shifting some resources to Alternatives to Detention to ensure the most cost effective use of Federal resources, the Budget proposes flexibility to reallocate funding as needed to detain all highrisk aliens apprehended by ICE. Consistent with its stated enforcement priorities and recent policy guidance, ICE will continue to focus detention and removal resources on those individuals who have criminal convictions or fall under other priority categories. At the same time, ICE will enhance the effectiveness of Alternative to Detention for low risk individuals, monitoring them at a lower per day cost than detention.

The FY 2013 budget request reflects an average bed rate at a rate of $122.00 per day that has been held constant from FY 2012 due to ICE's concerted effort to make detention and removal practices more efficient. ICE is planning on offsetting increases in detention contract and healthcare costs by maximizing the use of contracts with guaranteed minimums which provide reduced or free beds after occupying the minimum number of beds on the contract.

The FY 2013 bed rate does not include the potential impact of Department of Labor (DOL) service contract rate

adjustments. Beginning in FY 2012, ICE may face increased annual costs due to a change

Exhibit D: ISAP II Annual Report
Contract Year 2010

BI Incorporated

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November 6, 2010

Teamwork was a unifying theme for BI Incorporated and our customer in implementing the new Intensive Supervision and Appearance Program II (ISAP II) beginning November 6, 2009. After operating ISAP I for the Department of Homeland Security (DHS) for five-plus years, we are honored that the Alternatives to Detention (ATD) unit of Enforcement and Removal Operations (ERO) selected BI to manage ISAP II. BI is proud to have helped DHS and its supervisory units develop, manage and refine ISAP I, and now operate ISAP II.

Since program inception, we have focused on keeping participants engaged in the immigration court process so they adhere to ERO guidelines and final court orders. That focus supports ERO's mission to mitigate alien flight risk and promote immigration court order compliance.

During the ISAP I contract, BI managed its duties with professionalism and a value orientation. For example,

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We are proud of how we managed our responsibilities with DHS for more than six years. We are also pleased to have supported our customer's growth and changing needs while generating significant program cost improvements. Every year, we have refined our systems in concert with DHS requirements and requests.

As the program has grown, we have grown our team of immigration-focused managers, office staff and training personnel dedicated to this important program. One of our strengths is our corporate-level understanding of this program. Most of our executive team is the original team from 2004, which has contributed to consistent program delivery.

As always, BI remains focused on being fair, firm and consistent with program participants. This has been a cornerstone of our success and will continue to be our focus moving forward. As a result, trust and accountability are maintained and outcomes enhanced in immigration court appearances and compliance with final court orders—the primary goals of ISAP II's full-service supervision program.

On the following pages of this CY2010 report, you will find details about BI and our history of operating this program as well as detailed court appearance and outcomes data, lessons learned, recommendations, and Non-Governmental Organization collaboration for the first year of ISAP II. Please note, a majority of this report focuses on the full-service supervision component of ISAP II.

I would like to thank ATD for selecting BI, and for the opportunity to manage the ISAP II contract moving forward.

Sincerely,

/s/ BRUCE J. THACHER
BRUCE J. THACHER
President & Chief Executive Officer
BI Incorporated

The Department of Homeland Security's (DHS) paramount objective is the security of our nation. One facet of national security is the enforcement of United States immigration laws and cases in a fair and consistent manner. DHS issues a charging document to aliens that violate immigration laws and transfers jurisdiction of these cases to the Executive Office for Immigration Review (EOIR), which maintains 57 courts nationwide. DHS then decides to detain or release aliens to community supervision.

With limited bed space, DHS must reserve detention for aliens it considers highest risk. As a result, DHS supervises a large majority of individuals involved in the EOIR process within local communities.

The Intensive Supervision Appearance Program (ISAP) began as a DHS pilot in 2004. It was intended to serve as an alternative to detention focused on increasing immigration hearing appearance and compliance with final orders of removal. Today, at the close of the first year of

ISAP II, the full-service supervision component is important in managing non-detained aliens as they progress through the immigration court process. The full-service supervision component has very clear objectives, including:

- Delivering a systematic approach to supervision and case management for non-detained aliens.
- Ensuring that program participants comply with release conditions as determined by ERO.
- Focusing on guiding ISAP II participants to attend immigration court hearings.
- Maximizing compliance with immigration court orders, including orders of removal.
- Reducing absconder rates of the non-detained alien population.
- Providing accurate, reliable electronic supervision products and services.

ISAP II INVOLVES TWO TRACKS

ISAP II involves two segments: full-service supervision and technology-only services. ERO refers participants to one of these options based on assessed risk and circumstance. BI supplies the electronic monitoring technology—including GPS tracking and telephonic reporting systems—and 24/7 monitoring support services for the technology-only portion of ISAP II. ERO manages all other facets of the technology-only program. In CY2010, ERO referred 5,782 participants to the technology-only program. By the end of the base year, ERO terminated 2,024 participants from this program.

A majority of BI's ISAP II effort involves the full-service supervision program. This program includes intensive case management, supervision, electronic monitoring and individual service plans. These service plans cover legal services, translation needs, transportation services, travel documents, departure plans and referrals to appropriate community services. By coordinating these services and plans, ISAP II helps mitigate flight risk and guide the participant through the immigration court process.

In CY2010, ERO referred 19,996 participants to ISAP II's full-service supervision. At the end of the base year, 13,429 were still active in the program. Of these active participants, 47% were monitored via telephonic reporting and 28% were monitored using GPS. The remaining 6,567 inactive participants exited the program because they had been granted relief or removed from the United States; absconded; removed for reasons other than absconscion; or are still in the process of being removed.

A total of 25,778 participants were referred to ISAP II in CY2010. Of those, 78% were full-service supervision participants and 22% were technology-only participants.

SUCCESS STORY

ISAP II and ERO Cooperate on Successful Departure

ISAP II full-service supervision staff helped place a homeless participant at a housing shelter. The individual asked to depart voluntarily, but he did not have funding for a plane ticket. Cooperative efforts enabled the participant to remain in the community. He was provided with a stable living environment at the shelter (where home visits were completed), and he appeared at his

scheduled court date. ERO supported funding for his ticket, and he has since departed for his home nation.

FULL-SERVICE SUPERVISION PROGRAM OUTCOMES DEMONSTRATE POSITIVE RESULTS

Prior to ISAP I inception, EOIR court appearance rates were poor. In fact, in this report, we include a comparison of ISAP II full-service supervision data against two measures: a 2003 Office of Inspector General (OIG) study* and the 2003 and 2010 EOIR Statistical Year Book**. Both 2003 data sources pre-date ISAP I.

The 2003 OIG study found aliens who had not received an EOIR court order (Pre-Order) appeared at only one in three EOIR hearings of final decision. In addition, aliens complied with only 13% of final EOIR court orders in 2003. The 2003 EOIR Statistical Year Book found 59% of Pre-Order aliens attended final court hearings.

When we launched ISAP I in 2004, we heard from Non-Governmental Organizations (NGO) and immigration experts that often aliens involved in EOIR either did not understand the immigration court system or, in some cases, they did not trust it due to negative experiences in their home nation. As a result, BI has always focused on treating participants with respect and dignity, but also making it clear that they are accountable for meeting EOIR requirements.

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* *The Immigratoin and Naturalizatoin Service's Removal of Aliens issued Orders, Report # 1-2003-004.*

** *Executive Office for Immigration Review, FY 2010 Statistical Year Book.*

The participant-focused approach of full-service supervision has proven successful at building trust in the immigration court process and reducing barriers to court appearances. In turn, the program has produced positive results in guiding program participants to attend all immigration court hearings, including the all-important hearings involving final court decisions. In fact, for all EOIR hearings, full-service supervision program achieved a participant compliance rate of 99% for individuals considered active in the program. Of 15,794 court cases for active full-service supervision participants in CY2010, there were only 154 failures to appear. For hearings that involved final orders for active full-service supervision participants in CY2010, the program achieved a compliance rate of 94%, impressive rates when compared to data recorded prior to ISAP I development in 2004.

Many full-service supervision participants are still involved in the program after EOIR has issued a final court order. Their removal may be pending or they may be appealing the decision. In CY2010, 6,567 participants were terminated from the program. Of these inactive participants, 69% had final orders or were verified departures. At the end of CY2010, about half of these individuals had complied with final orders; only 7% had not. The remaining participants were still pending.

ERO developed a more broad approach to determining the success of full-service supervision. The agency developed 13 termination codes for inactive participants, with nine factors it considers "favorable" outcomes and four variables it considers "unfavorable." Of the 6,567 full-service supervision participants terminated from the program in CY2010, 87% were favorable outcomes; 13%

had absconded or violated program guidelines and were removed from the program.

BI outcomes data found that of the 4,552 participants who had final EOIR orders or verified departures, 47% had complied with the orders. A large number of participants, 46%, were still in process while only 7% had not complied.

BI also looks at outcomes data for inactive participant compliance with final court orders compared to the OIG data from 2003, before ISAP I was implemented. The OIG study found only 13% of a comparable group, Pre-Order participants, complied with final orders. In contrast, 84% of Pre-Order full-service supervision participants complied with final EOIR orders.

SUCCESS STORY

ISAP II Staff Assist Participant with Basic Life Needs

A participant reported to full-service supervision for a weekly scheduled visit and advised that until she was paid on Friday, she had nothing in the refrigerator to feed her family. The participant was very embarrassed and had great difficulty asking for help. Staff contacted several resources until one was found that could assist with providing food immediately. The participant was able to obtain a food basket for her family that day.

KEY COMPONENTS OF ISAP II FULL-SERVICE SUPERVISION

There are several core factors that contribute to the success of this program, including:

Collaboration: This program works because BI, Alternatives to Detention headquarters personnel, and local ERO are on the same page. Communication is regular and structured, yet each local ERO has the ability to reach out for immediate support.

Leadership: BI has developed a strong core team for full-service supervision. Many offices are led by BI program managers who have been involved since the inception of ISAP I. Other individuals are former case specialists trained and promoted to leadership roles. Others joined BI after years working in the immigration system. In addition, the BI executive management team is deeply involved in the program, and most executives have been involved since ISAP I was formed in 2004.

Case management: Direct case management and BI's case specialists remain critical to full-service supervision. Case specialists are the daily link to participants. They maintain frequent contact with participants throughout their involvement in the program. They help establish a bond of trust with the participant while also ensuring the individual is aware of requirements and consequences of non-compliant activity. Importantly, the case specialists reflect the diversity of the population served in each office.

Program flexibility: ISAP II full-service supervision is a valuable tool for ERO in managing the non-detained docket. BI assists ERO in refining the program by applying

best practices and implementing what has been proven to work in the field. This flexibility has enabled ERO to manage larger caseloads and has primed the program for future growth.

Language: BI issues materials in multiple languages to help participants understand and navigate the immigration system. Each BI office includes staff members who are multi or bi-lingual, with particular emphasis on languages prominent in that geographic location. During CY2010, 77% of the program case specialists were at least bi-lingual.

Training: Training is ongoing and involves continuous refreshers in electronic supervision technology for both BI and ERO staff. BI staff is regularly updated on immigration policies and procedures.

Program consistency: The ISAP II full-service supervision program, as shown in the program design segment of this report, is highly structured. Yet, it is flexible to meet the unique risks and needs of participants.

"ISAP II has provided the benefit of reducing detention costs while monitoring and encouraging ICE respondents to report to immigration court as required."

- ERO Field Office Director

BI works closely with ERO to ensure program delivery remains consistent.

Participant treatment: As mentioned earlier, a core principle of the program is treating participants with respect and dignity while also holding them accountable. With such high expectations come outstanding results.

NGO relations: Each office maintains an online directory of local community service providers, including health, legal, transportation, and other services that stabilize the participant in the community. By stabilizing the life of an individual, the participant is more accepting of the immigration system and more likely to comply with program guidelines.

Community relations: BI program managers maintain a dialog with community officials to ensure the community is aware of the services provided.

Consistent reporting: BI program managers conduct ongoing meetings with ERO to provide reports developed from BI's proprietary case management system, BI AccuTrax®.

Quality control: BI compliance specialists audit full-service supervision offices to ensure compliance with contract guidelines.

Cultural diversity: Participants from 171 nations in were served CY2010. BI achieves this by hiring culturally diverse staff, providing materials in multiple languages, and connecting participants with supportive community services.

SUPPORTING IMMIGRATION COURTS WITH EFFICIENCY

Immigration court intakes increased 12% from FY2006 and FY2010, according to the EOIR 2010 Statistical Year Book. With court intakes reaching almost 400,000 in FY2010, programs that drive efficiency are critical.

In the base year of CY2010, ISAP II full-service supervision produced a 99% attendance rate at all EOIR hearings and a 94% attendance rate at hearings of final court decision. Through a well-coordinated approach to case management, the program has greatly reduced EOIR failures to appear at hearings, helping to streamline a very busy EOIR docket.

In addition, immigration judges must be satisfied that notice of hearing "time and place" is provided to an alien or their representative prior to issuing a removal or in absentia decision. Judges know with confidence full-service supervision participants have received fair notice.

ISAP II full-service supervision also prepares participants for eventual departure as they proceed through the immigration court process. By gathering travel documents early in the supervision process and developing travel plans, participants may decide to depart voluntarily in advance of a final decision. This process plays an important role in ensuring participants have access to resources regarding various options and consequences, including voluntary departure.

LESSONS LEARNED AND RECOMMENDATIONS

This CY2010 report includes several lessons learned and recommendations. Most importantly, we see from the data and hear feedback from ERO that ISAP II full-

service supervision is working as intended. Participants are attending court hearings at a high rate and comply with final court orders at rates higher than those that predate the program.

We have also learned many key points that will help the program adapt and evolve. For example, ongoing communication with ERO and influential stakeholders such as NGOs is critical. In addition, we have learned that continuous innovation will fine tune the program. By exploring pilot programs, such as expediting cases in EOIR or the use of bond fees, validated best practices can be expanded to other offices.

BI bases its recommendations on experience and lessons learned. Some of these recommendations are broad, such as the need to continually train staff and ERO. Others are tactical, such as the need for a formal legal presentation for participants at intake and orientation.

ISAP II is now poised to expand its supporting role for ERO. After a smooth and rapid expansion in November 2009, 35 offices are now in operation and more are planned for the future. BI stands ready to manage these non-detained aliens when they are referred to community supervision.

SUCCESS STORY

ISAP II Aids in Verified Departure

A participant was released from detention and enrolled in the program in order to care for her two young sons. Full-service supervision staff connected the participant with community resources and assisted her with plans for self-deportation. She sent her belongings to her home country and obtained travel documents for herself and

her sons. The participant departed the U.S. within 30 days which was verified with the Automated Tracking System.

"By providing an alternative means of supervision, the ISAP II program has allowed deportation officers to focus on other tasks. As a result more time is dedicated to actual case management and communication with foreign consulates. This in turn has led to an increased rate of removal."

- Deputy Field Office Director

ISAP II CONTRACT YEAR 2010: BY THE NUMBERS

19 new full-service supervision offices opened for a total of **35**

More than **14,000** participants transitioned during program implementation

85 new employees trained during program start-up

More than **10,000** outbound calls made to transition telephonic reporting

171 home nations represented by program participants

Referrals to more than **1,500** community partners and Non-Governmental Organizations

16 languages spoken by ISAP II staff

19,996 participants referred to full-service supervision

5,782 participants referred to technology-only services

ISAP II: AN ALTERNATIVE TO DETENTION PROGRAM

After two reports from the Office of Inspector General (OIG) in 1996 and 2003, the need for effective alternatives to detention became clear. Successfully removing non-detained aliens was identified as an area of weakness

within the Immigration and Naturalization Service. Specifically, the two studies found alien removal rates were 11% and 13%, respectively. The 2003 OIG report made several recommendations for improvement, including expansion of a pilot program called the Appearance Assistance Program (AAP). The AAP pilot was administered by the Vera Institute of Justice from 1997 to 2000. It focused on supervising individuals in the community who were progressing through removal proceedings and aimed to increase hearing appearance rates and compliance with final orders of removal. The pilot showed promising results as a community supervision program for aliens moving through the immigration court process (see Appendix for ISAP II comparison to Vera results).

The lessons learned from the AAP were applied in the launch of another pilot program—the Intensive Supervision and Appearance Program (ISAP). The original ISAP program, now referred to as ISAP I, began in 2004 and concluded in November 2009. BI Incorporated, along with government officials, had the privilege to operate ISAP I and grow the program from a pilot to a valued supervision program. After a competitive bidding process, DHS's Alternatives to Detention (ATD) unit of Enforcement and Removal Operations selected BI to manage a new program called ISAP II. This new program combined the best of intensive case management processes of ISAP I with another supervisory program called the Enhanced Supervision and Reporting program. BI began operating ISAP II for ATD on November 6, 2009.

"ISAP II allows my staff to concentrate on the most egregious cases and thus ensure removal is imminent."

- Supervisory Detention & Deportation Officer

ABOUT BI INCORPORTATED

Established in 1978, BI Incorporated works with approximately 900 U.S. public agencies nationwide. In addition to managing the Intensive Supervision and Appearance Program II for the U.S. Department of Homeland Security, BI is a national leader in offender monitoring technology, supervision services, community-based treatment services, and reentry and day reporting center programs for adults and juveniles. BI works closely with public officials to reduce recidivism, enhance public safety, and strengthen the communities it serves. To achieve success, BI assesses the risk and needs of individuals it supervises, matches services to address those risks and needs, and partners with supervising agency personnel to monitor compliance with conditions of release. Our approach and focus on objective outcomes have delivered verifiable and consistent results.

BI INCORPORATED ISAP II LOCATIONS

ISAP II Full-Service Supervision Offices:

Atlanta	Newark
Baltimore	New Orleans
Boston	New York City (4)
Buffalo	Orlando
Charlotte	Philadelphia
Chicago	Phoenix
Dallas	Portland
Delray Beach	Salt Lake City
Denver	San Antonio
Detroit	San Bernardino
El Paso	San Diego
Hartford	San Francisco
Houston	Santa Ana
Kansas City	St. Paul
Los Angeles	Seattle
Miami	Washington, D.C.

1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010

1996
Office of Inspector General (OIG) report finds 11% compliance among non-detained aliens issued final orders of removal.

1997-2000
Vera Institute of Justice Appearance Assistance Program (AAP) pilot focused on increasing hearing appearance rates and compliance with final orders shows promising results.

2003
A second OIG report finds 13% compliance among non-detained aliens issued final orders of removal.

2004
July: Request for Proposals released by Department of Homeland Security (DHS) for Intensive Supervision and Appearance Program (ISAP I) pilot.
March: BI incorporated awarded ISAP I contract for eight pilot sites.
June: Eight ISAP I pilot sites opened.

2006
October: Delray Beach, FL site opened to support Miami office.

2007-2009
The Enhanced Supervision and Reporting (ESR) program is operated as an Alternative to Detention program using electronic supervision and reporting.

2007
ISAP I expands to include six additional offices nationwide.

2008
August: Santa Ana, CA office opened bringing total ISAP I office count to 16.

2009
April: Request for Proposals released for ISAP II combining elements of ISAP I with the ESR program.
July: BI awarded ISAP II contract for 19 additional sites in contract base year.
November: BI transitions over 14,000 participants from ISAP I and ESR and begins operating ISAP II.

ISAP II PROGRAM DESIGN

ISAP II assists Alternatives to Detention (ATD) and Enforcement and Removal Operations (ERO) with supervision of unauthorized immigrants involved in the U.S. immigration legal system. ISAP II offers alternatives to detention that allow immigration officials to reserve detention beds for certain higher risk aliens.

ISAP II is highly structured and is designed to facilitate effective services and promote clear communication, rapid response and efficient operations.

The program involves two segments: full-service supervision and technology-only services. ERO refers aliens to one of these options based on assessed risk and circumstances. ISAP II manages participants based on their status within the immigration court system, including:

- Pre-Order: These program participants have not received an order of removal from the immigration court.
- Post-Order: These participants have received a final order of removal from the court.
- Appeal: These participants have received a court decision, but they or the government are appealing the decision.
- Post-Order Custody Review—Reasonable Foreseeable Removal: These individuals have received a court order of removal, completed a custody review, and are likely to be removed in the near future.
- Post-Order Custody Review—Non-Foreseeable Removal: These individuals have also received a court

order of removal and completed a custody review, but it is estimated that they will not be removed in the near future.

SUCCESS STORY

GPS Data Proves Timely in Absconscion Case

A known gang member in the ISAP II full-service supervision program who was under GPS supervision generated a tamper status alert. ERO was notified immediately by telephone while BI staff attempted to contact the participant. All attempts at contact failed and messages sent to the GPS device were not acknowledged.

ERO's response was immediate. A search team went to the participant's known address while additional personnel contacted other known associates and relatives. While the participant evaded attempts at contact, BI staff provided ERO with GPS information specific to the participant's location, direction, and speed of movements. This timely information assisted in the apprehension of the participant who was then remanded to custody.

FULL-SERVICE SUPERVISION

The ISAP II full-service supervision program involves intensive case management, supervision, electronic monitoring, and individual service plans. These service plans include legal, translation, and transportation services as well as plans for travel documents, departure and referrals to appropriate community services. These coordinated services help mitigate flight risk and guide the individual through the immigration court process.

In the ISAP II full-service supervision program, the participant reports to a designated ISAP II office within 24 hours of referral for intake, assessment and orientation.

After the individual service plan is developed, the case management process begins. This involves a combination of office visits, residence verifications, random home visits, employment verifications, and an update of the participant's schedule. The supervision of participants in the full-service program is supplemented with two forms of electronic monitoring—GPS tracking and telephonic reporting. GPS tracking is a more intensive supervision technology, but both of these options provide excellent details about the person's adherence to schedules and supervision plans.

A participant's stage of supervision reflects their stage in the immigration court process. The frequency of reporting to the ISAP II office, home visits, employment checks and use of electronic monitoring correspond to the specific stage of supervision. Additionally, the program is successful because of consistent case management services, including treating the participant with dignity and respect, providing community connections for unique participant needs, and holding the participant accountable.

The full-service supervision program offers structure and flexibility, an approach that produces the desired results: high appearance rates at preliminary immigration court hearings and enhanced compliance to final court orders, including departure if ordered.

PARTNERSHIP IN ACTION

Non-Governmental Organizations provide critical assistance to BI in operating the ISAP II program. These partnerships enhance the success of program participants. Working closely with community-based organizations, the full-service supervision component of ISAP II

provides community referrals to participants on an ongoing basis. Services include locating providers for legal services, food and clothing, substance abuse treatment, mental health needs, medical and dental assistance, disaster recovery (e.g. Haitian earthquake relief), wellness health screenings, translation, homeless outreach and shelters, religious support, public transportation and consulate assistance.

In the base contract year alone, ISAP II worked with more than 1,500 community organizations throughout the ERO areas of responsibility it serves to promote participant success. A small sample of ISAP II community partners includes:

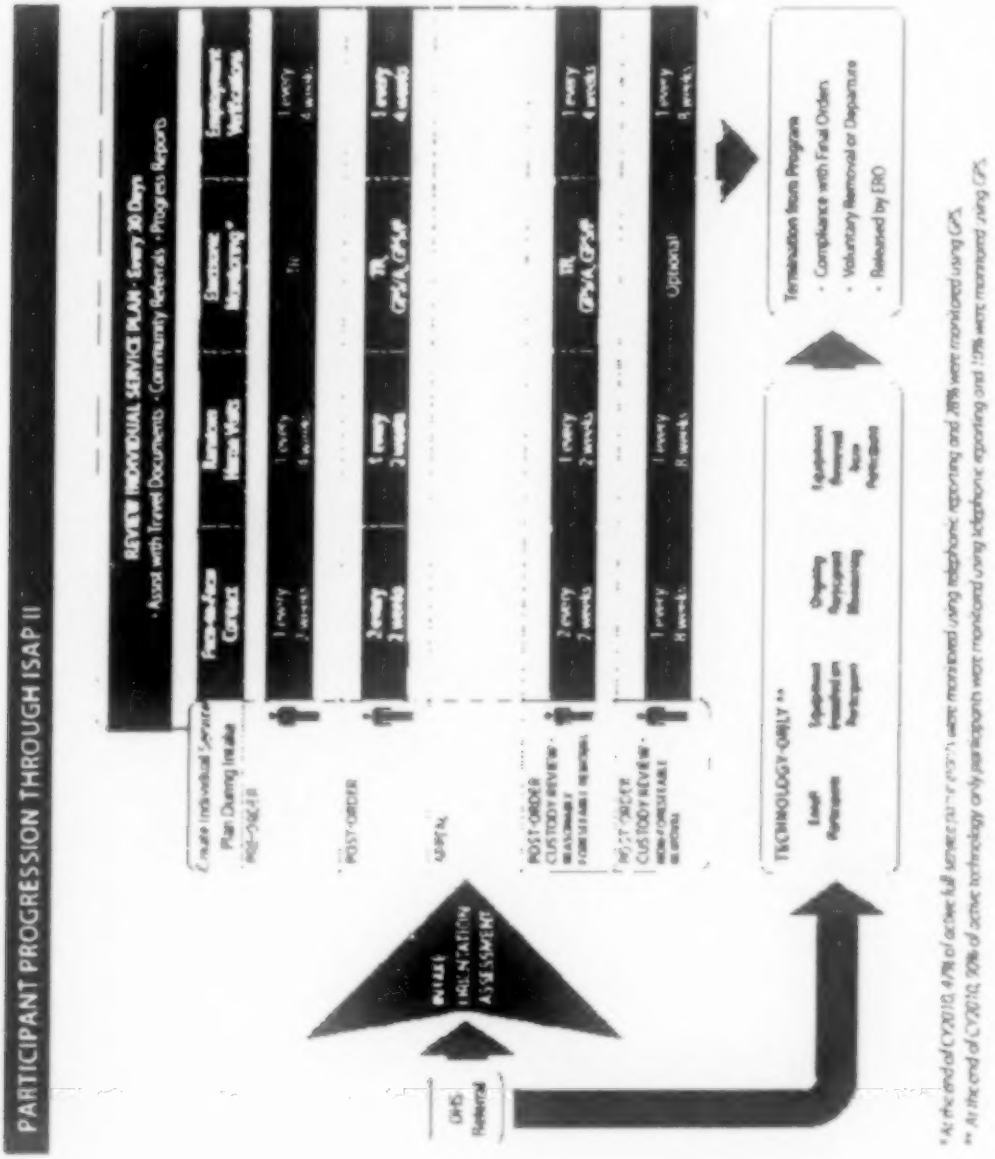
- Catholic Charities
- Legal Services
- Centers for Victims of Torture
- Public Health Department
- Department of Homeless Services
- Public Transportation
- Food Pantry Community Missions
- Salvation Army
- Goodwill Industries
- United Way
- Immigration Counseling Services
- Women, Infants & Children Program

TECHNOLOGY-ONLY SERVICES

Participants involved in the technology-only component of ISAP II do not receive the full-service supervision provided from BI's 35 offices throughout the U.S. The technology-only portion of ISAP II provides ERO personnel nationwide with two tools for enhanced supervision: GPS tracking and telephonic reporting. The GPS tracking system, BI ExacuTrack® One, is a sophisticated ankle-worn device that tracks a participant's movements and reports violations of specific parameters, called exclusion and inclusion zones. The telephonic reporting system, BI VoiceID®, helps officers monitor compliance by making random and scheduled telephone calls to participants. The system identifies participants through a biometric "voice print" and verifies that the individual is where he or she is supposed to be throughout the day.

These supervision services are used at the discretion of ERO. They can be used to reduce face-to-face visits with lower-risk participants or enhance supervision of higher-risk participants where full service supervision is not an option. For ERO offices within proximity of full-service ISAP II offices, BI staff members can assist with participant enrollment, equipment installation and removal. ERO officers manage participant monitoring by logging into BI's secure web portal and responding to violations as needed. BI's technology-only program manager and the BI GuardCenter® provide ERO officers with equipment training and 24-hour a day support.

Participant monitoring and progression through ISAP II continue to be refined by ATD. Participants referred to ISAP II—no matter which of the two program options—are eventually terminated from the program when they comply with final court orders, voluntarily depart for their home country, or are released by ERO.



* At the end of CY2010, 4% of active full service participants were monitored using telephonic reporting and 18% were monitored using GPS.

** At the end of CY2010, 90% of active technology-only participants were monitored using telephonic reporting and 10% were monitored using GPS.

FINDINGS & DISCUSSION

ISAP II provides outcomes to measure if the program is meeting objectives. The following pages review specific findings for ISAP II during CY2010. On page 16, the chart highlights the number of full-service supervision participants referred to ISAP II by Enforcement and Removal Operations (ERO) for the contract year. The total population is segmented into "active participants," or those individuals still being supervised by ISAP II, and "inactive participants," those individuals who exited the program. ISAP II was still supervising a majority of the full-service participants at the end of the contract year.

The charts also indicate the legal status of the ISAP II participant when the person entered the program. Participant classifications include Pre-Order, Post-Order, Appeal, Post-Order Custody Review—Reasonable Foreseeable Removal, and Post-Order Custody Review—Non-Foreseeable Removal. We combine these legal stages in the charts to more simply compare participants who have not received an order of removal (Pre-Order), participants who have received an initial decision (Post-Order and Appeal), and those who have received a final order of removal and completed a custody review (POCR-RFR and POCR-NFR).

On pages 16 and 17, please find data for ISAP II active participants in the full-service supervision program. On pages 18 through 21, data is presented for inactive ISAP II participants in the full-service program. The charts review attendance at all EOIR court appearances and attendance at hearings where final decisions are rendered. We also compare the data for CY2010 against a pre-ISAP benchmark. Finally, on pages 22 and 23, data

is presented for the technology-only component of ISAP II.

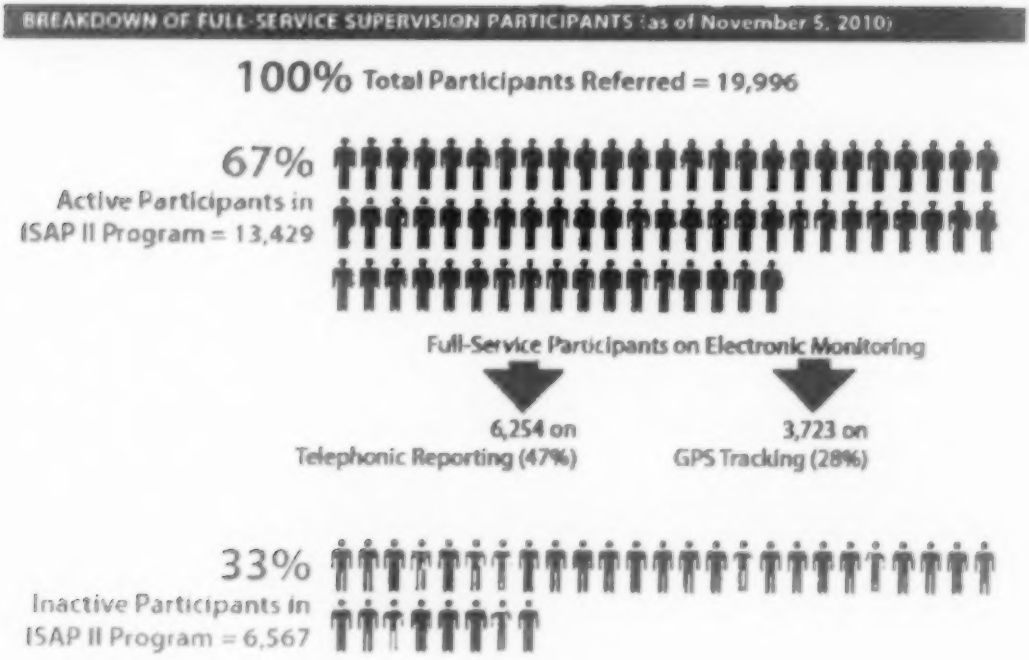
"We are seeing significant, positive results. We are seeing increases in successful voluntary departures, removals, and obtaining travel documents while reducing in absentia cases. Essentially, very few cases end up being non-compliant."

- Supervisory Detention & Deportation Officer

ISAP II YEAREND SNAPSHOT OF FULL-SERVICE SUPERVISION PARTICIPANTS

Enforcement and Removal Operations (ERO) referred 19,996 participants to ISAP II full-service supervision during CY2010. On the last day of the contract year, 13,429, or 67%, of these referrals were still actively involved in the program. Of active full-service participants, 47% were being monitored with telephonic reporting and 28% were being monitored with GPS tracking.

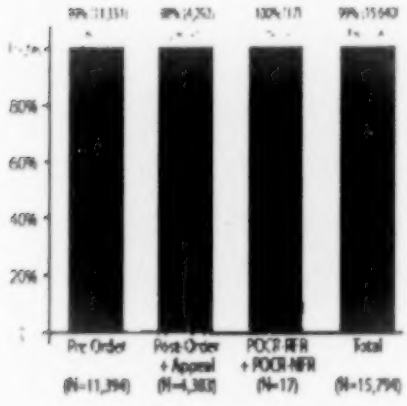
Another 6,567 participants, or 33%, of these referrals were considered inactive participants and had been terminated from ISAP II full-service supervision for one of three reasons: 1) they were granted relief or removed from the United States; 2) they had absconded from the ISAP II program and could not be located; 3) they were being removed from ISAP II for reasons other than absconscion or completion and are still in process. During CY2010, a number of compliant participants were removed from ISAP II by Immigration and Customs Enforcement in an effort to most effectively use Alternatives to Detention resources.



"ISAP II provides ERO with up-to-the-minute information on the whereabouts of potential absconders, assisting our enforcement efforts by greatly increasing our rapid response capabilities."

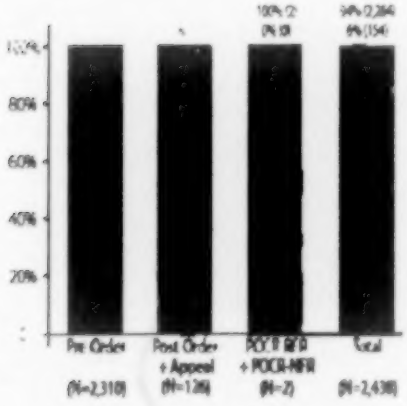
- Supervisory Detention & Deportation Officer

ACTIVE ISAP II FULL-SERVICE SUPERVISION PARTICIPANTS



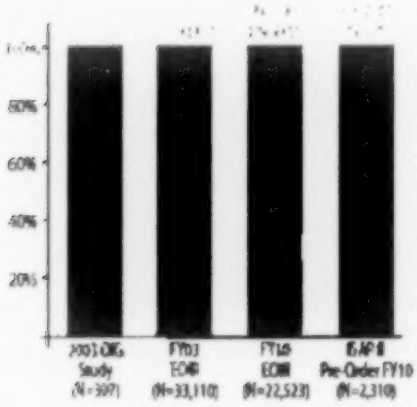
ATTENDANCE AT ALL EOIR HEARINGS WHILE ACTIVE

During CY2010, there were 15,794 immigration court appearances scheduled for ISAP II full-service supervision participants considered "active" in the program. Participants appeared at 99% of these hearings. Pre-Order participants, the largest participant population, appeared at 99% of all immigration court hearings while involved in the program. This high appearance rate reflects positively on the program's ability to keep participants engaged in the immigration court process, a critical step toward successful compliance with final court orders or verified departure.



ATTENDANCE AT FINAL EOIR HEARINGS WHILE ACTIVE

It is important for participants to attend hearings where the immigration court will issue a final order. This is a critical function of ISAP II full-service supervision as it indicates that participants are engaged in the court process and are more likely to comply with the court decision. Of the 2,438 final hearings held for active ISAP II participants, they attended 2,284, a 94% compliance rate. The majority of these hearings involved Pre-Order participants. Of the 2,310 court hearings that involved final orders for Pre-Order participants, 2,157, or 93%, of these individuals attended.



PRE-ORDER ATTENDANCE AT FINAL EOIR HEARINGS WHILE ACTIVE COMPARED TO BENCHMARKS

BI uses two pre-ISAP benchmarks to measure program success. We isolate the comparisons to the ISAP II Pre-Order population. The comparable data sources include a 2003 Office of Inspector General study* and EOIR Statistical Year Book** data from 2003 and 2010. The OIG study recorded a final court appearance rate of 34% for a comparable group. The 2003 EOIR data found a 59% attendance rate, and the 2010 EOIR data recorded a 78% attendance rate. In comparison, the ISAP II Pre-Order population attended final court hearings at a 93% rate.

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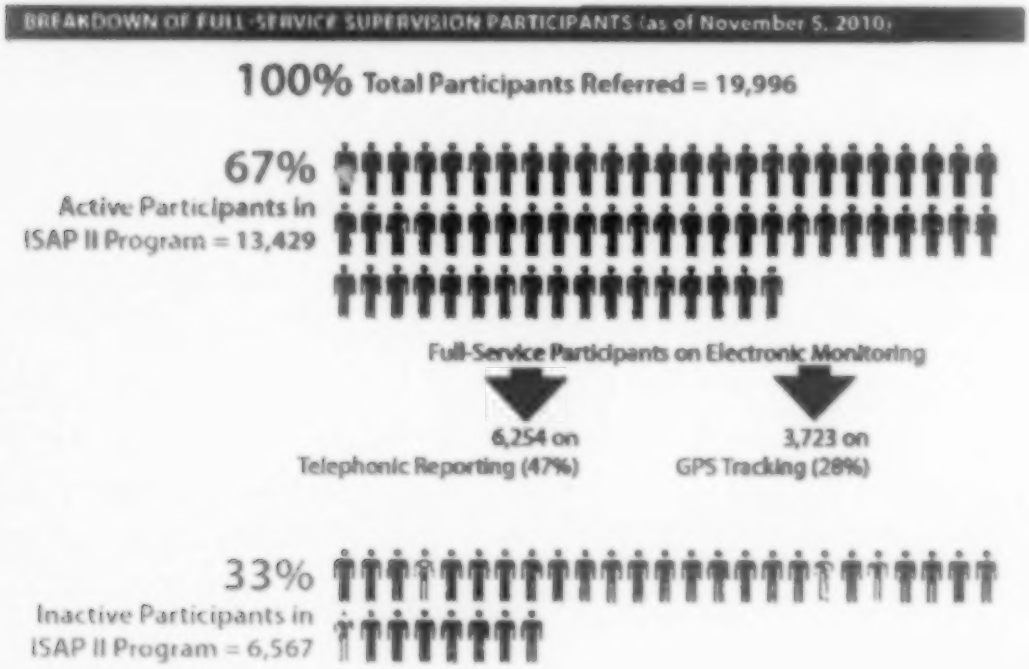
* *Immigration and Naturalization Service's Removal of Aliens Issued Orders, Report #I-2003-004.*

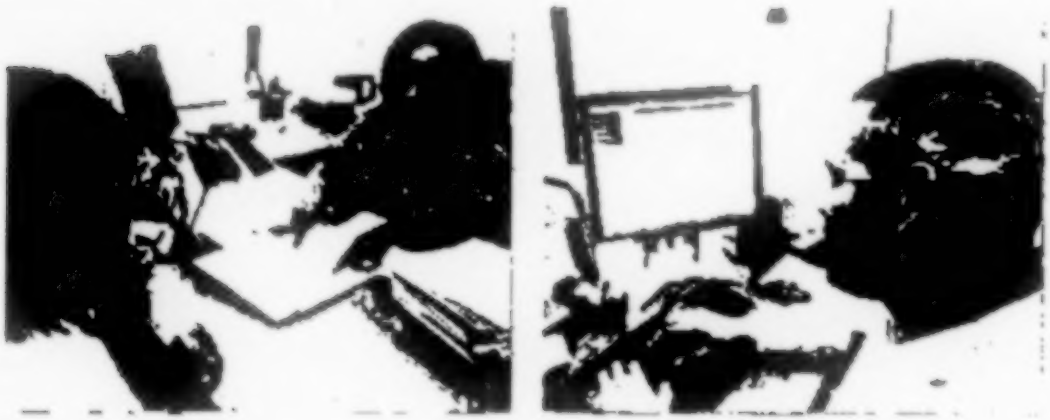
** *Executive Office for Immigration Review, FY 2010 Statistical Year Book. Note change in methodology - administrative closures are no longer included to calculate failure to appear rate. As of 2009 EOIR only uses IJ decisions and orders in absentia.*

INACTIVE ISAP II FULL-SERVICE SUPERVISION PARTICIPANTS

INACTIVE PARTICIPANTS WITH & WITHOUT FINAL EOIR ORDERS

There were 6,567 participants terminated from ISAP II full-service supervision during CY2010. Of these participants, 4,552, or 69%, had final orders of removal or were verified departures. A total of 2,015, or 31%, were participants without final orders of removal.





INACTIVE ISAP II FULL-SERVICE SUPERVERSION PARTICIPANTS

ISAP II CASE TERMINATIONS WITH AND WITHOUT FINAL ORDERS

The following table was developed by Enforcement and Removal Operations (ERO) to examine the reasons for termination for the 6,567 inactive participants who exited the ISAP II full-service supervision program in CY2010. ERO developed 13 variables, nine of which it considers "favorable outcomes" and four of which it considers "unfavorable outcomes". Favorable outcomes include termination types A, B, G, H, I, J, K, L, and M. These ISAP II participants had complied with program requirements, departed the United States or were no longer required to participate by ERO, among other factors. During CY2010, ERO found 86.8% of inactive participants were compliant with program requirements. Unfavorable outcomes include termination types C, D, E and F, where participants absconded or violated program requirements. In CY2010, 13.2% of participants were not compliant with ISAP II requirements and were terminated from the program.

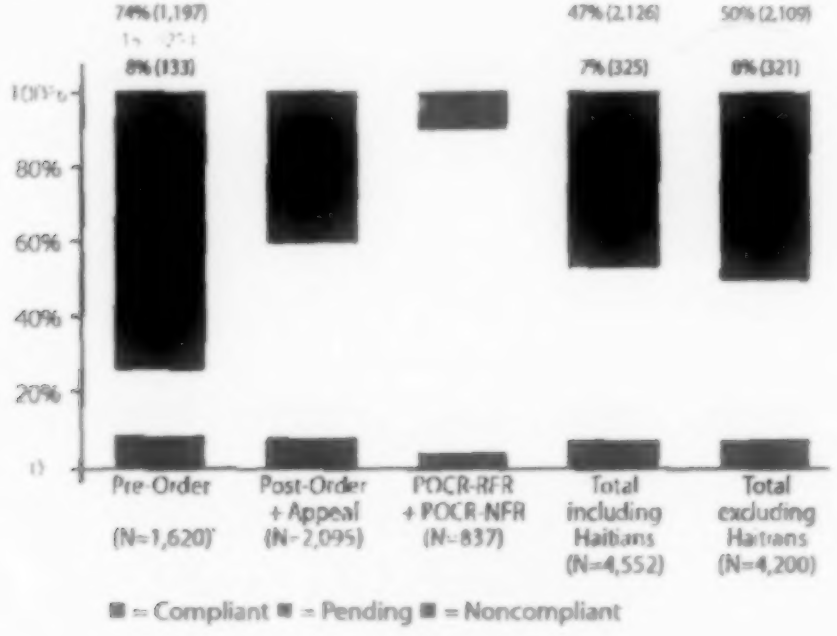
FAVORABLE OUTCOMES			
Type	Description	Total	Percent
A	Departure Verified (Final Order of Removal)	999	15.2%
B	Relief/Benefit Granted (Cancellation of Removal, Adjustment of Status, Asylum, or Admission)	601	9.2%
G	No Longer Required to Participate (As determined by ERO for various reasons)	2,534	38.6%
H	Arrested by ICE for Removal (Final Order, Active Participant)	83	1.3%
I	Pending Departure Verification (Final Order of Removal or Voluntary Departure)	183	2.8%
J	Arrested by Other Law Enforcement Agency	515	7.8%
K	Other (No longer required to report; medical or deceased)	120	1.8%
L	Departure Verified (Voluntary Departure)	156	2.4%
M	Departed the United States while in proceedings	142	2.2%
ISAP II TOTALS		5,703	86.8%

UNFAVORABLE OUTCOMES			
Type	Description	Total	Percent
C	Pre-Order Program Absconder (Terminated from ATD)	432	6.6%
D	Post Order Program Absconder (Terminated from ATD)	325	4.9%
E	Pre-Order Program Violator	61	0.9%
F	Post Order Program Violator	46	0.7%
ISAP II TOTALS		864	13.2%
Total ISAP II Full Service Case Terminations		6,567	100.0%

The subsequent charts on this page take a closer look at the 4,552 inactive ISAP II participants in the full-service supervision program with final orders or verified departures. Charts are shown with and without ISAP II cases when relief was granted. A total of 601 ISAP II participants were granted relief during CY2010.

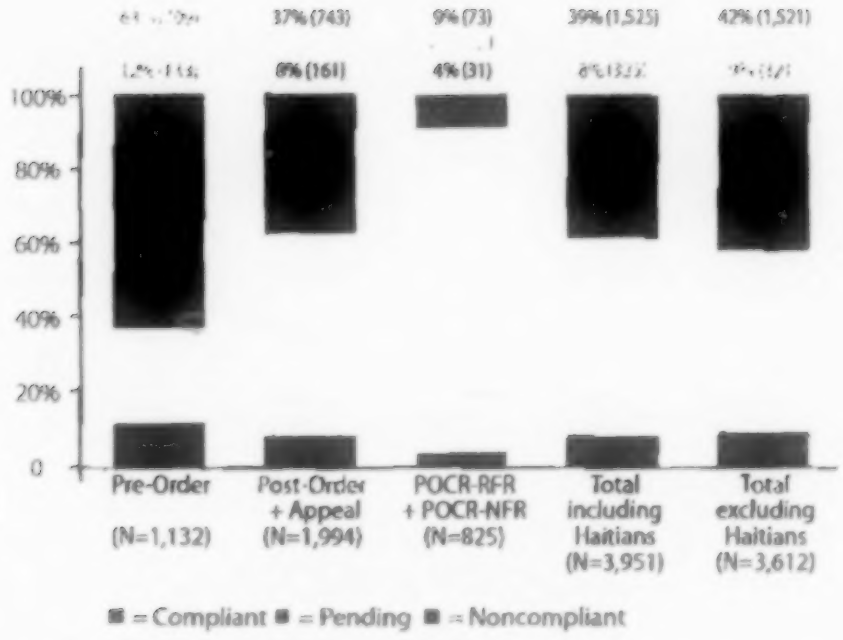
Note: Additional calculations are provided to reflect a unique situation in CY2010, the January 2010 earthquake in Haiti. The figures below provide compliance rates with and without Haitian participants who were adminis-

tratively removed from ISAP II while their eligibility for temporary protective status was determined. In both instances, compliance rates for the total population rise when this group is removed.



FINAL EOIR ORDER COMPLIANCE OR VERIFIED DEPARTURES (INCLUDES RELIEF GRANTED)

This chart reviews compliance with final EOIR orders or verified departures of ISAP II participants in the full-service supervision program. Of the 4,552 inactive ISAP II participant cases during CY2010, 47% of these participants were compliant or verified departures based on final EOIR decisions. Another 46% were still pending. Only 7% did not comply with final orders. Of the 4,552 inactive participants measured for final order compliance or verified departure, 1,620 were Pre-Order participants. Of these Pre-Order participants, 74% had complied with final court orders or were verified departures. These statistics include relief granted cases.



FINAL EOIR ORDER COMPLIANCE OR VERIFIED DEPARTURES (EXCLUDES RELIEF GRANTED)

This chart reviews final EOIR order compliance or verified departures for ISAP II, but the statistics exclude relief granted cases. In CY2010, the compliance rate for all inactive ISAP II participants was 39%. Another 53% of ISAP II participants in this category were still pending. Among the 1,132 Pre-Order participants, 63% had complied with final orders or were verified departures.

ISAP II COMPARED TO BENCHMARK

The chart below compares ISAP II full-service supervision to a pre-ISAP benchmark, a 2003 report by the Office of Inspector General (OIG)*. The OIG report was commissioned to determine whether the Immigration and

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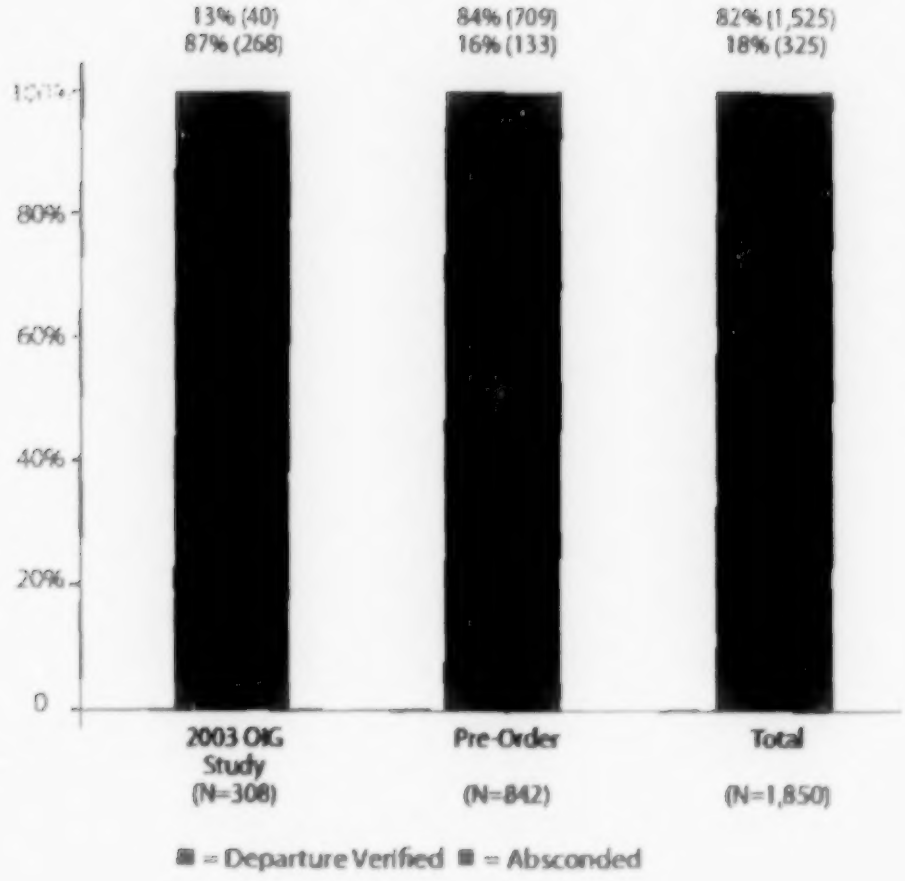
* *The Immigration and Naturalization Service's Removal of Aliens Issued Order, Report # 1-2003-004.*

Naturalization Service had improved its effectiveness at removing non-detained aliens with final orders. The report reviewed a random sample of the non-detained alien population from the EOIR database. It did not include cases in which relief was granted or individuals were allowed to stay in the U.S. We compare the OIG sample to ISAP II participants who were enrolled as Pre-Order and later received final orders. Specifically, we combine verified and voluntary departures that result from final orders (A and L terminations) and compare this data against Post-Order participant absconders (D terminations). The total ISAP II terminated population from CY2010 is also included for reference.

The Pre-Order ISAP II population in full-service supervision achieved an 84% verified departure rate as compared to 13% recorded in the OIG study. This data highlights one of the primary objectives of ISAP II full-service supervision—ensuring participants with final orders of removal depart successfully. Of the 842 Pre-Order participants, 133, or 16%, absconded.

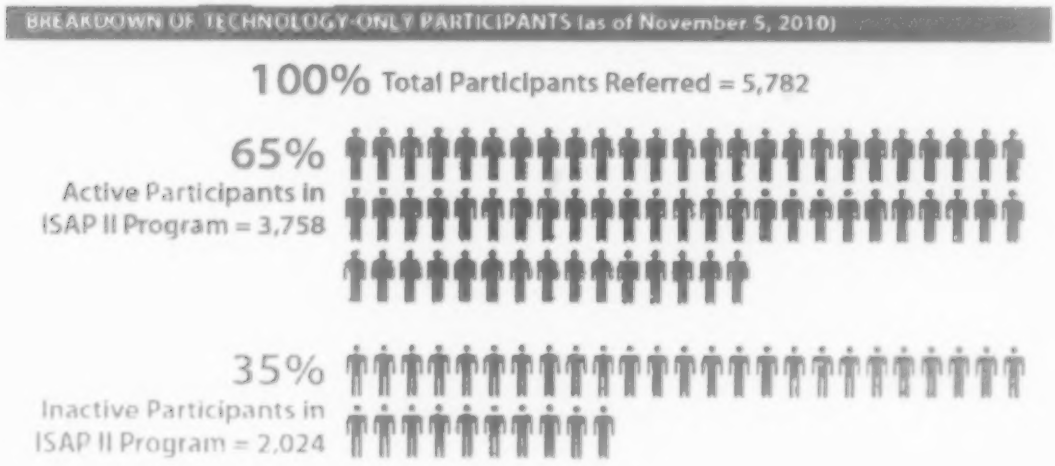


"EOIR court appearance rates have significantly improved, thereby reducing the number of aliens who failed to appear at their court hearings. Based on constant interaction between the ISAP II team and the participant, travel document issuance has improved, thereby reducing the length of stay in ICE detention, should detention be necessary in cases where the alien has not voluntarily departed."

- Assistant Field Office Director

ISAP II Year end Snapshot of Technology-Only Participants

Throughout CY2010, Enforcement and Removal Operations (ERO) referred 5,782 participants to the technology-only portion of ISAP II. At the close of CY2010, 3,758, or 65%, were still being supervised through the technology-only program. The remaining 2,024, or 35%, participants had been terminated by ERO throughout the year.



ACTIVE ISAP II TECHNOLOGY-ONLY PARTICIPANTS

Two supervision tools are available to Enforcement and Removal Operations (ERO) within the technology-only portion of ISAP II: BI ExacuTrack One GPS tracking and BI VoiceID telephonic reporting. ExacuTrack One and VoiceID are both used at the discretion of ERO officers as tools to enhance supervision efforts and assist in managing caseloads. ERO officers determine how to best employ these tools and when to terminate participant supervision. The breakdown of supervision technology used among active technology-only participants at the close of CY2010 is shown below.

90%
Participants on Telephonic Reporting = 3,371

10%
Participants on GPS Tracking = 387

INACTIVE ISAP II TECHNOLOGY-ONLY PARTICIPANTS

The following table highlights the reasons for termination among technology-only participants during CY2010. Thirteen termination types, as developed by Enforcement and Removal Operations (ERO), are used for both GPS and telephonic reporting participants. Of the 2,024 terminations by ERO during CY2010, 1,672 participants were monitored using telephonic reporting and 352 were monitored using GPS tracking.

FAVORABLE OUTCOMES

Type	Description	TR	Percent	GPS	Percent	Total	Percent
A	Departure Verified (Final Order of Removal)	34	2.0%	88	25.0%	122	6.0%
B	Relief/Benefit Granted (Cancellation of Removal, Adjustment of Status, Asylum, or Admission)	83	5.0%	17	4.8%	100	4.9%
G	No Longer Required to Participate (As determined by ERO for various reasons)	1,005	60.1%	105	29.8%	1,110	54.8%
H	Arrested by ICE for Removal (Final Order - Active Participant)	35	2.1%	30	8.5%	65	3.2%
I	Pending Departure Verification (Final Order of Removal or Voluntary Departure)	17	1.0%	14	4.0%	31	1.5%
J	Arrested by other Law Enforcement Agency	45	2.7%	16	4.5%	61	3.0%
K	Other (No longer required to report: medical or deceased)	52	3.1%	32	9.1%	84	4.2%
L	Departure Verified (Voluntary Departure)	4	0.2%	18	5.1%	22	1.1%
M	Departed the United States while in proceedings	0	0.0%	1	0.3%	1	0.0%
ISAP II TOTALS		1,275	76.3%	321	91.2%	1,596	78.9%

UNFAVORABLE OUTCOMES

Type	Description	TR	Percent	GPS	Percent	Total	Percent
C	Pre-Order Program Absconder (Terminated from ATD)	56	3.3%	3	0.9%	59	2.9%
D	Post-Order Program Absconder (Terminated from ATD)	94	5.6%	17	4.8%	111	5.5%
E	Pre-Order Program Violator	41	2.5%	4	1.1%	45	2.2%
F	Post-Order Program Violator	206	12.3%	7	2.0%	213	10.5%
ISAP II TOTALS		**397**	**23.7%**	**31**	**8.8%**	**428**	**21.1%**
Total ISAP II Technology-Only Case Terminations		**1,672**	**100%**	**352**	**100%**	**2,024**	**100%**

ISAP II LESSONS LEARNED

BI offers the following observations and lessons learned from the contract base year for ISAP II. We base these lessons on our experience operating this program as well as feedback collected from Enforcement and Removal Operations (ERO) personnel and ISAP II program managers.

1. ISAP II full-service supervision is an effective supervisory program for ERO, with 19,996 participants enrolled in the program this contract year. The program freed up valuable detention space and provided an additional supervision mechanism for individuals involved in the immigration court process.

2. The ISAP II full-service supervision methods, including direct case management and ongoing contact with program participants, achieve the desired goals of the program—attendance at court hearings and compliance with final Executive Office for Immigration Review (EOIR) hearing decisions.

3. BI managers and ERO officers report that in locations where participants pay bond fees, such as in Philadelphia and St. Paul, there is an additional incentive to comply with ISAP II full-service supervision guidelines.

4. We learned that having ISAP II full-service supervision participants report approximately two to four times monthly versus three times weekly (an ISAP I requirement), is an appropriate level of commitment and allows staff to better manage larger participant caseloads.

"BI has been an asset to our program and is a major factor in our overall success."

- Supervisory Detention & Deportation Officer

5. Effective communication is essential to ISAP II. This involves communication between all key ISAP II stakeholders including participants, BI staff, Non-Governmental Organizations (NGO), and ERO personnel. Both ERO and BI staff report a strong team effort in ISAP II, resulting in positive results and a willingness to adapt and evolve as program needs change.

6. We learned using GPS tracking of participants provides a higher level of supervision, particularly for individuals who may be a flight risk as a final court hearing approaches. In addition, BI managers report that participants on GPS tracking understand they are being monitored closely and behave accordingly.

7. We learned the "Fast Track" court program, a pilot program in which EOIR expedites ISAP II full-service supervision participant cases, shows promise in both court compliance and participants returning to their home nation more quickly.

8. Accelerated hearings provide significant cost savings to the government. Of the 15,794 hearings this contract year, 11,797 were continuances. Each participant had an average of five continued hearings prior to a final hearing taking place.

9. We learned ISAP II full-service supervision expands effectively without compromising program integrity.

Using proven policies and procedures learned in ISAP I, ISAP II full-service supervision expanded to 35 offices without interruption to participant supervision in the contract year.

10. We learned that by involving experienced BI staff members, who can either relocate to a new office or mentor new staff, new ISAP II full-service supervision offices can be added smoothly without interrupting current operations.

11. Consistent home visits, including home residence verifications, are essential to gain a snapshot of the participant's life and community ties. These visits also help build trust and rapport with participants, which help improve outcomes.

12. By providing a high level of supervision services, ISAP II full-service supervision allows deportation officers to focus on other tasks. As a result, ERO can dedicate more time to actual case management and communication with foreign consulates. This, in turn, has led to an increased rate of removal. In San Diego, ERO reported one officer was able to manage a larger caseload with ISAP II full-service supervision support.

13. We have heard from ERO that ISAP II participants are more inclined to surrender travel documents than aliens not involved in this program. In addition, ERO officers report that obtaining these travel documents increases "self-deports" and compliance with all court hearings and final court orders.

14. We have learned that community resources in each ISAP II full-service supervision office are an impor-

tant element of the program. By developing relationships with NGOs and maintaining a comprehensive list of NGO community resources for housing, legal support, medical, and more, participants are more stable in the community and more likely to comply with program and immigration court requirements.

SUCCESS STORY

Community Resources Contribute to Participant Safety

A participant reported marital issues to a BI case specialist in a full-service supervision office. The participant's situation escalated and she later reported her husband had become aggressive. She expressed a need to leave her home due to continued domestic violence. The case specialist advised the participant to seek assistance and provided referrals to local domestic violence shelters. The participant then moved to a temporary victim shelter, obtained a protection order against her husband, and sought counseling at the local shelter.

ISAP II RECOMMENDATIONS

These recommendations are based on our experience operating ISAP II as well as feedback provided by Enforcement and Removal Operations (ERO) personnel and ISAP II program managers. We believe the following recommendations would enhance ISAP II moving forward.

1. ERO and BI should continue to collaborate and develop pilot programs, such as the strategic alignment pilots and "Fast Track" court program, to refine ISAP II full-service supervision and enhance outcomes. If cases were processed in less than one year, results could be enhanced and overall costs reduced.

2. We recommend more flexibility in reporting requirements. Holding participants accountable for their behavior and compliance to program rules is essential; having the ability to add or remove sanctions based on participant compliance or noncompliance would enhance outcomes.

3. Because effective communication and continual improvement are so important in ISAP II, we recommend BI and ERO continue to meet frequently throughout the year. This includes monthly meetings at ERO headquarters and annual contract review meetings. Additionally, we recommend a partnership meeting be held annually to include ERO and ISAP II managers. Finally, regular meetings between ERO personnel and ISAP II program managers on the local level should continue as they promote consistent coordination of services in the field.

4. We recommend an ISAP II orientation and training be conducted with ERO field officers and headquarters personnel as they are assigned to the Alternatives to Detention (ATD) unit. This training would contribute to consistent understanding of ISAP II objectives, goals and program operation.

"ISAP II (full-service supervision) has also increased the level of compliance with court orders, i.e. voluntary departures and final orders of removal."

- Deputy Field Office Director

5. Because Non-Governmental Organizations (NGO) and community service providers have proven effective partners in stabilizing a participant's life, we recommend BI continue to meet frequently with NGOs —both nationally and in local communities—and maintain a comprehensive referral list of service providers.

6. Training should remain a priority for both ERO and BI. ERO needs to be informed of changes in supervision technology and program practices, and BI staff members need to continually advance their knowledge of immigration and court procedures.

7. We recommend home visits continue to be a prominent component of ISAP II full-service supervision. Though time-consuming, these visits provide rich detail into a participant's life and community ties, which support effective supervision and help determine flight risk.

8. ERO is currently creating a risk assessment tool and associated guidelines to be used in ISAP II. Upon

completion, we recommend a thorough training of all ISAP II full-service supervision, ERO and ATD personnel to maximize consistent and effective use of these tools.

9. We recommend additional benchmarks be developed to help refine analysis of the ISAP II full-service supervision and technology-only service components.

10. Additional data relative to the technology-only portion of ISAP II would enable analysis of its success in achieving key ISAP II objectives. Specifically, hearing appearance rates and final order status, as tracked for full-service participants, would assist in determining the effectiveness of the technology-only program track.

IT SECURITY: BI EARNS ACCREDITATION FROM ERO

As part of ISAP II contract requirements, BI was required to submit an information technology (IT) security plan and complete a Certification and Accreditation (C&A) process to meet government standards for unclassified information technology resources. BI provided extensive IT security and contingency plan documentation for the primary software applications used to operate the ISAP II contract.

The ERO and BI IT security teams worked in close coordination to complete the C&A process on schedule. In addition to the review of documentation, a Security Test & Evaluation Plan was administered by the DHS Information and Assurance Division to verify proper controls were in place by BI. On August 19, 2010, James Chaparro, Executive Associate Director for ERO, granted BI

an Authority to Operate (ATO) representing that the necessary security requirements had been met successfully.

The work toward achieving the ATO required strong collaboration between ERO and BI and was a tremendous team effort. The guidance provided to BI by the Information Resource Management Division of ERO was invaluable.

APPENDIX

ISAP II Full-Service Supervision Component Benchmark Comparison to the Vera Appearance Assistance Program (AAP) and the Office of Inspector General (OIG) Study

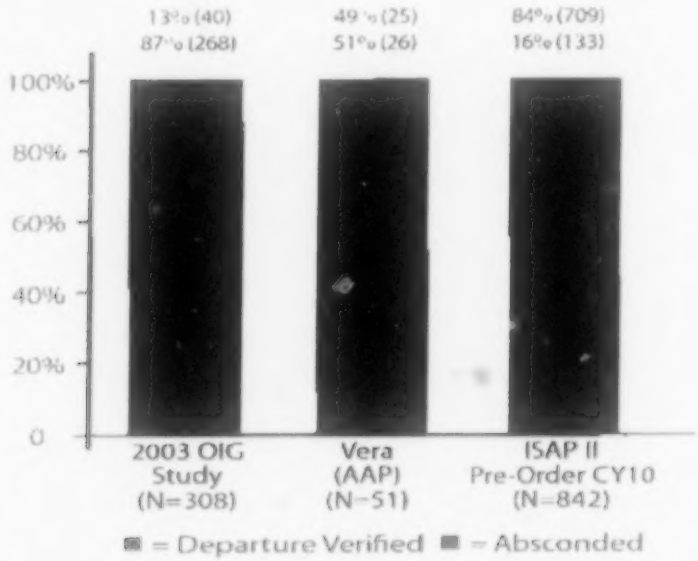
The Intensive Supervision Appearance Program (ISAP) was funded by Congress in 2004, after a 2003 OIG study[1] identified low compliance with final orders and appearance at immigration court hearings. The ISAP II full-service supervision model, developed by the Department of Homeland Security (DHS), incorporated lessons learned from the Vera pilot (2000)[2], called the Appearance Assistance Program (AAP), which operated from 1997-2000. This document compares the outcomes from the OIG study, Vera pilot and ISAP II full-service supervision program, and provides benchmark comparisons to track ISAP II full-service supervision success. The ISAP II outcomes are taken from the Contract Year 2010 Annual Report[3] and cover the base year of operations.

PROGRAM/STUDY COMPONENTS

	Vera Pilot Program Report (2000)	ISAP II Full-Service Supervision Component (2010)	OIG Study (2003)
Program Objectives	Increase appearance rates at court hearings and increase compliance with final orders of removal, including departure procedures and compare the results to other alternatives such as bond, parole and release on orders of recognizance (Vera, 2000)	Increase appearance rates at court hearings and increase compliance with final orders of removal, including departure proceedings (BI Incorporated, 2010)	"Determine whether the INS had improved its effectiveness at removing non detained aliens with final orders, and whether the INS actually implemented the actions ... agreed to ... in our 1996 report" (OIG, 2003, p. i.)
Location	New York City	35 full service supervision offices nationwide	Random Sample of the non detained docket from the LOIR database
Population/ Sample	Referred by INS: 534 Asylum seekers, criminal aliens, and undocumented workers 336 final orders at termination. 227 were low priority 109 were high priority	Referred by ERO ISAP II Pre-Order Participants: 1,620 New York ISAP II Pre-Order Participants: 72 All individuals referred by ERO were accepted and were not identified by criteria in Vera study (asylum seeker, criminal alien, undocumented worker)	308 Random sample and not identified by specific criteria in Vera study (asylum seeker, criminal alien, undocumented worker)
Levels of Supervision	Low priority and high priority. Low priority was defined as orientation and court reminders only. Vera outcomes are based on the high priority only.	Determined by legal stage: Pre Order, Post Order, Appeal, Post Order Custody Review Reasonable Foreseeable Removal, Post Order Custody Review Non Foreseeable Removal	N/A
Program components	High priority included: • Orientation • Face-to-face office visits • Telephonic reporting • Court reminders • Home visits • Community connections	Legal stage determines frequency of services: • Orientation • Face-to-face office visits • Random home visits • Electronic monitoring • Employment verification • Community connections • Service plans • Progress reports	N/A

The Appearance Assistance Program paved the way for expansion of Alternatives to Detention Programs by developing communication channels between providers and Immigration and Naturalization Service (INS). The Vera study also tracked participants moving through the complete immigration court system for the first time. The outcomes recorded from the Vera study enabled DHS to take what worked from the Vera study and expand it to eight original ISAP I sites across the country. As ISAP I showed success, the program was expanded to several additional sites. In 2009, the program was again expanded to what is today ISAP II, with 35 full-service supervision sites nationwide. As we continue to measure success based on three simple factors, appearance at court hearings, appearance at final court hearings, and compliance with final orders, DHS can educate decision makers on the continued success of this cost effective program.

Further discussion of the outcomes of alternative to detention programs, with detailed methodology, is included below.

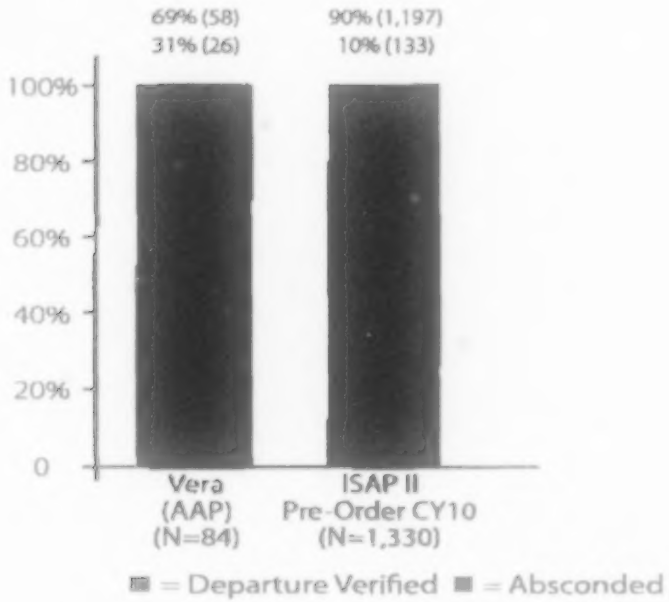


COMPLIANCE WITH FINAL ORDERS (OIG METHODOLOGY)

The OIG (2003) study offers a methodology from which benchmark comparisons can be made. The chart below compares all three outcomes (OIG, Vera, and ISAP II full-service supervision) using this methodology. The OIG study did not include cases where relief was granted or outcomes resulting in the individual being allowed to stay in the U.S.

To fairly compare Vera, ISAP II full-service supervision and OIG, the Vera numbers were adjusted as follows (ISAP II reports outcomes based on the OIG methodology, so no adjustments were needed):

- Of the 109 participants receiving final orders, 33 who were granted relief or allowed to stay in the U.S. were excluded.
- The Vera study included five departures AAP staff verified that INS did not confirm, but are included here.



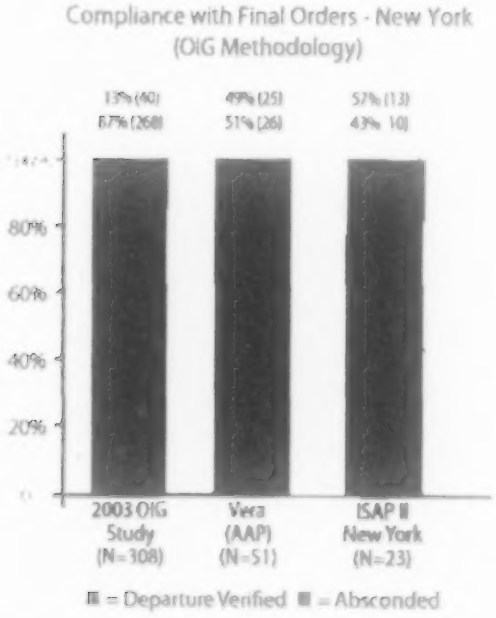
COMPLIANCE WITH FINAL ORDER (VERA METHODOLOGY)

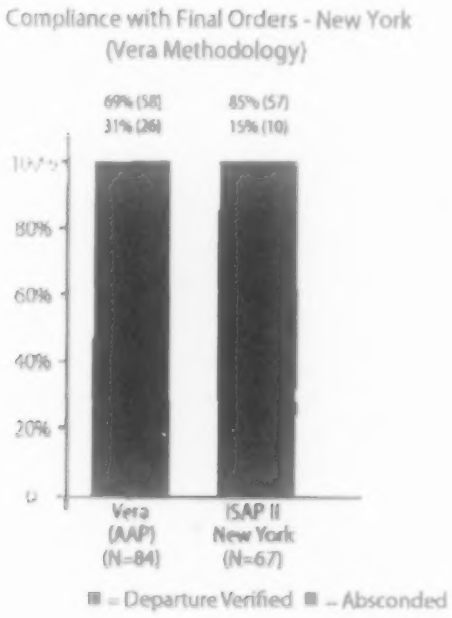
In order to compare ISAP II full-service supervision to the methodology used in the Vera study, the following adjustments to ISAP II numbers were made (note that OIG is not included as the Vera methodology could not be replicated with the available OIG data):

- Participants with relief granted were added back into the ISAP II full-service supervision numbers.
- Participants with relief granted, and those allowed to stay in the U.S., were included in the Vera numbers.

COMPLIANCE WITH FINAL ORDERS (NEW YORK COMPARISON)

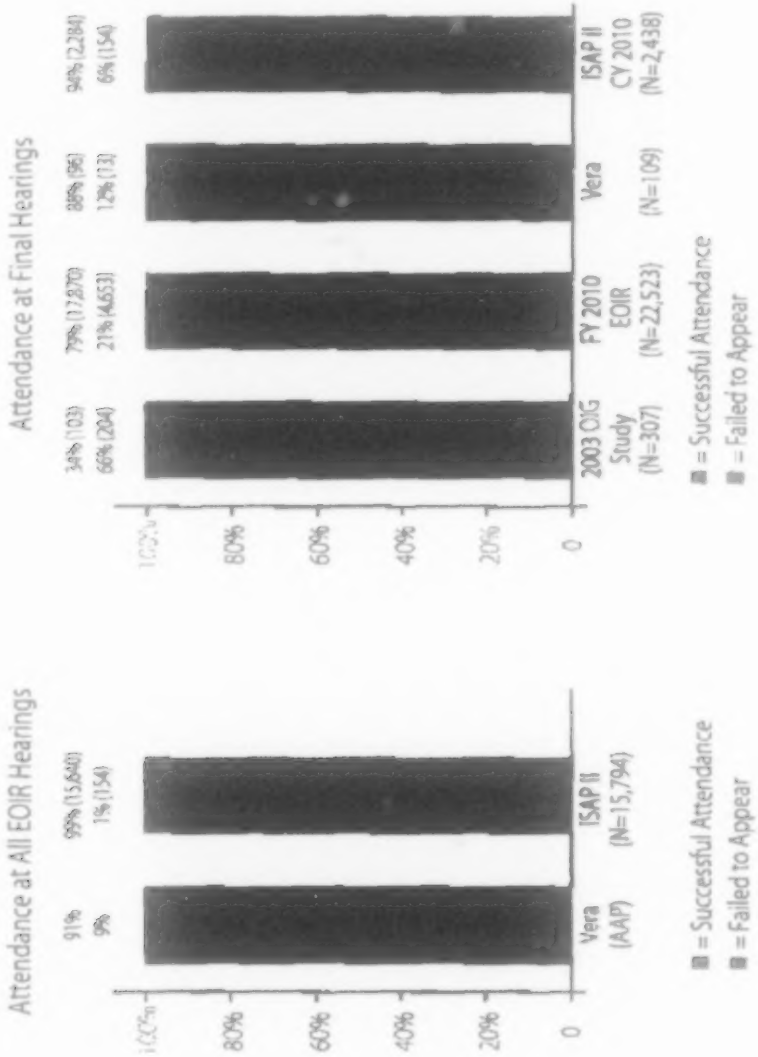
The two charts below follow the same methodology described earlier and compare Vera's population, which was located in New York, to the ISAP II full-service supervision Pre-Order population specific to only the New York office.





ATTENDANCE AT IMMIGRATION COURT HEARINGS

A second benchmark comparison is attendance at immigration court hearings. The chart below compares attendance at all hearings for Vera and ISAP II participants (OIG only reported attendance at hearings of final decision; therefore, a comparison for OIG could not be included). The second chart below compares ISAP II and Vera attendance at hearings of final decision against the OIG study and EOIR benchmarks.



SUMMARY

The outcomes from the Vera pilot and ISAP II full-service supervision are compelling and all programs should continue to be reviewed as the immigration system evolves in its ability and desire to measure program effectiveness throughout the immigration system.

- The outcomes reveal that both Vera and ISAP II full-service supervision had improved appearance rates and compliance when compared to the OIG study.
- When comparing Vera's AAP to ISAP II full-service supervision, ISAP II shows increased rates of compliance with final court decisions:
  - 90% compared to 69% with Vera methodology (All ISAP II full-service supervision)
  - 84% compared to 49% with OIG methodology (All ISAP II full-service supervision)
  - 85% compared to 69% with Vera methodology (New York ISAP II full-service supervision)
  - 57% compared to 49% with OIG methodology (New York ISAP II full-service supervision)
- When comparing Vera's AAP to ISAP II full-service supervision, ISAP II shows increased rates of appearance at immigration court hearings:
  - 99% compared to 91% for ALL hearings
  - 94% compared to 88% for hearings of final decision

- Both programs showed substantial improvement over unsupervised aliens, as indicated by the OIG numbers.
- Outcomes indicate Alternatives to Detention programs are an effective tool for increasing compliance with court attendance and compliance with final decision orders.

By increasing usage of alternative programs, ERO has the ability to measure success through programming that is effective, efficient and affordable.

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[1] *U.S. Department of Justice, Office of Inspector General, Evaluation and Inspections Division (2003). Immigration and Naturalization Service's Removal of Aliens Issued Orders, Report #1-2003-004.*

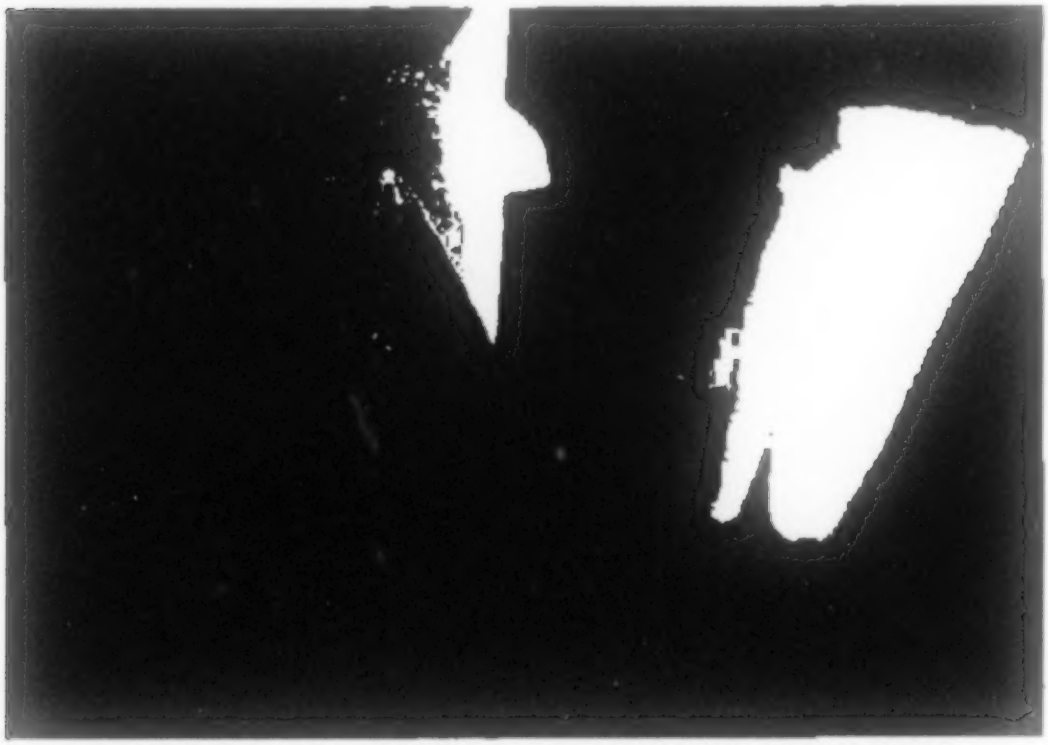
[2] *Vera Institute of Justice, Appearance Assistance Program (2000). Testing Community Supervision for the INS: An evaluation of the Appearance Assistance Program, Volume I. Final Report to the Immigration and Naturalization Service.*

[3] *BI Incorporated (2010). ISAP II Contract Year 2010 Annual Report.*

Exhibit E: ISAP II Annual Report
Contract Year 2011

INTENSIVE SUPERVISION APPEARANCE PROGRAM II

AN ALTERNATIVE TO DETENTION PROGRAM FOR THE U.S. DEPARTMENT OF HOMELAND SECURITY



CONTRACT YEAR 2011 ANNUAL REPORT

ISAP II 2011 ANNUAL REPORT

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"I have a great working relationship (with ISAP) that I consider a very valuable portion of my unit's
Supervisory Detention and Deportation Officer

MANAGEMENT LETTER

Nov. 6, 2011

BI Incorporated is pleased to prepare this annual report about the Intensive Supervision Appearance Program (ISAP), an alternative to detention program of the U.S. Immigration and Customs Enforcement's (ICE) Enforcement and Removal Operations (ERO). This report reviews program design and expectations, significant events, performance measures, lessons learned and recommendations for future operations. We are proud to report that ISAP continues to cost effectively support ERO to meet a critical need for community supervision of non-detained individuals when they are involved in the U.S. immigration legal system.

While policies adjust to meet the needs of evolving immigration issues, ISAP remains vital to ERO because it continues to focus on its core purpose since established in 2004: facilitate attendance at immigration court hearings and enhance compliance with final court rulings.

ISAP has always relied on a comprehensive case management process for participants—many unfamiliar with the U.S. immigration court system—to achieve positive outcomes. This case management system not only builds

trust with ISAP participants but also delivers quick and appropriate sanctions when necessary. The system tailors service plans for each participant, and it links immigration officials, community-based partners and participants effectively.

BI still utilizes this case management process, but today we have greatly expanded the use of location monitoring systems to assist in compliance and community supervision efforts. We have also strengthened our strategic partnerships with community-based organizations and non-governmental organizations to support participants as they proceed through Executive Office for Immigration Review hearings. Please see our staff profiles and comments from our strategic partners, both of which illustrate our commitment to a comprehensive approach.

The results are impressive. During the 2011 contract year, ISAP expanded to 40 locations (see map on page 21) and served participants from more countries than ever. In fact, during the 2011 contract year we helped ERO supervise a record-high 35,380 participants. Despite this rapid program growth, we remained vigilant to achieve high appearance rates for participants at all EOIR hearings and compliance with final court decisions. Success does not mean we have become complacent, though. Please reference the appendix for research we have completed with a respected researcher to better understand what influences positive results, including removals. We will work with ERO to use this valuable information to adapt and adjust, as needed.

I believe the success of ISAP hinges on several factors, including our partnership with ERO; a value orientation; staff teamwork, integrity and experience; and a flexible,

integrated approach. I would like to thank ERO for trusting BI to manage ISAP. We look forward to adapting and evolving with ERO as immigration policies and challenges unfold.

Sincerely,

/s/ BRUCE J. THACHER
BRUCE J. THACHER
President, BI Incorporated

PASS
Timetables

EXECUTIVE SUMMARY

Nov. 6, 2011

This annual report presents highlights and results of the Department of Homeland Security's (DHS) Intensive Supervision Appearance Program (ISAP)—from Nov. 6, 2010 through Nov. 5, 2011. Throughout this report, we refer to this period as Contract Year 2011 (CY 2011). The Alternatives to Detention (ATD) unit, a division of Immigration and Customs Enforcement's (ICE), Enforcement and Removal Operations (ERO), oversees ISAP.

ISAP is in its 7th year. BI Incorporated has managed ISAP since its inception in 2004. This program supports EOIR to enforce the nation's immigration laws in a fair and effective manner. ISAP employs a comprehensive case management system and location monitoring systems to facilitate attendance at all EOIR hearings and compliance with final court orders, including removal to a person's country of origin.

The ISAP design facilitates cost-effective services and promotes clear communication, rapid response and efficient operations. ISAP delivers two supervision options: a full-service option and a technology-only option. The full-service option involves intensive case management,

supervision, location monitoring technology and individual service plans. These service plans include legal, translation, and transportation services and plans for travel documents, departure and referrals to appropriate community services. Program managers and case specialists at the full-service offices also connect participants with local non-governmental and community-based organizations to facilitate stability in participants' lives.

ERO initially intended the ISAP technology-only option for locations where a full-service option was not available. However, it has evolved into a de-escalation tool for ERO. Participants involved in the ISAP technology-only option do not receive the full-service supervision provided from BI's 40 ISAP locations (see map on page 21). The technology-only option provides ERO personnel nationwide with two tools for location monitoring: GPS tracking and telephonic reporting. During CY 2011, ERO use of the technology-only option almost doubled, from 5,752 to 11,333 participants.

During CY 2011, the agency began to implement co-location sites, referred to as Government or "G" sites. G sites offer full-service opportunities in more locations. The first G site opened in March in Providence, RI, within 30 days of site approval. By yearend, five G sites were open, including locations in Tampa, FL, Bakersfield, CA, Marlton, NJ, and Charleston, SC. All sites reached recommended supervision counts quickly. As anticipated, the formation of the G site model allowed ERO and BI case specialists to communicate frequently for a coordinated approach to participant services, including simplified referrals, resolution of participant issues, and other program efficiencies.

In CY 2011, ISAP supported ERO to supervise 35,380 program participants, compared to 25,778 in CY 2010. Of the 35,380 participants supervised during CY 2011, 23,112 were still actively involved in ISAP at the end of the contract year. Throughout this report, we refer to these individuals as "active" participants. We refer to the remaining 12,268 participants as "inactive," meaning they exited the program. Inactive participants exited the program because EOIR granted relief or ordered removal from the United States; they had absconded and could not be located; or ERO had removed them from the program for reasons other than absconscion or completion and are still in process. An important component of the CY 2011 data analysis focuses on the inactive participant population to review compliance to final EOIR orders.

ISAP facilitated positive outcomes in CY 2011, including:

- A 37.2% increase in ISAP participants from the previous contract year
- Using an ERO-developed formula for removals, 84.0% of ISAP participants involved in the full-service supervision option and 46.7% in the technology-only option successfully departed the country (see page 15 for a full description)
- Using an OIG study benchmark for removals, 83.8% of ISAP participants involved in the full-service supervision option and 65.0% in the technology-only option complied with a final EOIR decision (see page 15 for a full description)
- Participants attended 99.4% of all EOIR hearings during the year

- Participants attended 96.0% of hearings when EOIR rendered a final decision
- The cost to administer ISAP has declined considerably due to refinements in the program model, operational efficiencies as the program expands, and advancements in technology

ISAP offers many benefits, including cost savings, high compliance outcomes, and conformity with due process and best practices internationally. On the following pages, please find a review of the program design, statistical data, lessons learned and recommendations for the future. Throughout this annual report, you will also find success stories, comments from ERO and NGOs we work closely with, and profiles of ISAP staff, many of whom have been with ISAP since ERO established the program.

Close observation leads to voluntary departure

By working closely with participants, ISAP case specialists are in tune with changes in their lives and their flight risk. For example, a participant, estranged from her husband, expressed problems with supporting her two children and meeting ISAP requirements. The case specialist connected the participant with community services, including food, rental assistance and counseling. When the participant continued with non-compliant behavior, ERO requested increased supervision with GPS tracking and more counseling on the EOIR process. Through this support, firm supervision and by arming the participant with a better understanding of the court system, ISAP was able to assist the individual to obtain voluntary departure to her home nation, with her two children, in time for a new school year there.

PROGRAM DESIGN

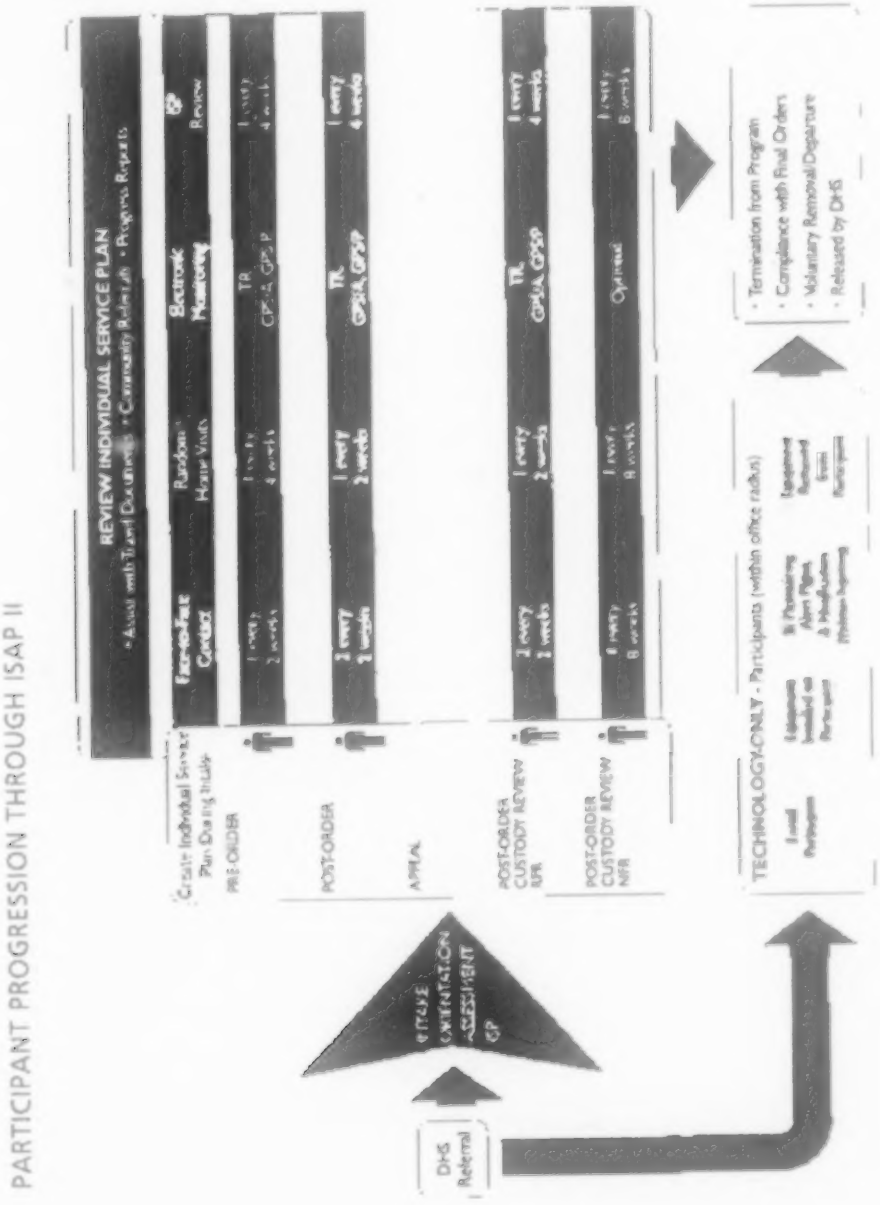
The Intensive Supervision Appearance Program (ISAP) is a highly structured program that supports Enforcement and Removal Operations (ERO) to monitor and manage individuals released to community supervision while they are involved with the U.S. immigration legal system. ISAP is an alternative to detention program that allows ERO to manage the non-detained population while also meeting international best practices for immigration.

ISAP manages participants based on their status within the immigration court system, including:

- **Pre-Order:** These program participants have not received an order of removal from the immigration court.
- **Post-Order:** These participants have received a final order of removal from the court. Voluntary departure decisions are also included.
- **Appeal:** These participants have received a decision from the Immigration Court and have filed a Notice of Appeal (NOA) with the Board of Immigration Appeals (BIA). The Appeal is pending.
- **Post-Order Custody Review-Reasonably Foreseeable Removal:** These individuals have received a court

order of removal, completed a custody review, and will be removed in the near future.

- **Post-Order Custody Review-Non-Foreseeable Removal:** These individuals have also received a court order of removal, completed a custody review, but it is estimated that they will not be removed in the near future.

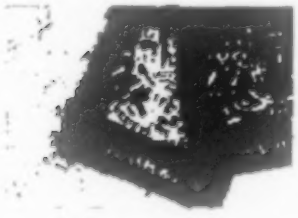


ISAP delivers two supervision options: full-service and technology-only. ERO refers individuals to one of these options based on assessed risk, circumstance, and full-service availability. The ISAP design facilitates cost-effective services and promotes clear communication, rapid response and efficient operations.

FULL-SERVICE SUPERVISION

The ISAP full-service option relies on a comprehensive case management process for participants—many unfamiliar with the U.S. immigration court system—to facilitate positive outcomes. This case management success builds trust with ISAP participants and their family members but also delivers quick and appropriate sanctions when necessary. The system tailors service plans for each participant, and it links immigration officials, community-based partners and participants effectively. It involves individual service plans, face-to-face visits at an ISAP office, home visits, and a focus on obtaining travel documents. During CY 2011, ISAP performed 353,964 office and 201,054 home visits with participants. Additionally, the staff secured 9,889 travel documents. By securing travel documents, ISAP staff prepares program participants for the possibility that EOIR may order removal from the country.

TRAVEL DOCUMENTS



Obtaining travel documents is an important component of the ISAP process and eventual removal, if ordered. In CY 2011, ISAP case specialists collected 9,889 travel documents from 140 nations.

As part of full-service supervision, the participant reports to a designated ISAP office within 24 hours of referral by ERO for intake, assessment and orientation. After an individual service plan is developed, the case management process begins. This involves a schedule of office visits, residence verifications, random home visits, and updates to the participant's schedule. Supervision of participants in the full-service option is supplemented with two forms of electronic monitoring—GPS tracking or telephonic reporting. GPS tracking is a more intensive location monitoring technology, but both of these options provide excellent details about the person's adherence to schedules and supervision plans (See Technology-Only Supervision on page 9 for more details).

A participant's stage of supervision reflects their stage in the immigration court process. The frequency of reporting to the ISAP office, home visits, employment checks and use of electronic monitoring corresponds to the specific stage of supervision. Additionally, the program is successful because of consistent case management services, including treating the participant with dignity and respect, building trust in the immigration process, providing community connections for unique participant needs, and holding the participant accountable.

The full-service option offers structure and flexibility to adjust, an approach that produces the desired results: high appearance rates at preliminary immigration court hearings and enhanced compliance with final court orders, including departure if ordered.

A focus on travel documents pays off

Obtaining travel documents from participants is a primary focus as they enter ISAP. By obtaining these ma-

terials, removals can be expedited if ordered. One participant, who had received a decision from EOIR, was enrolled in ISAP to support his removal to his nation of origin, India. The individual resisted providing his passport and visiting the Indian consulate, but the case specialist persisted. This persistence paid off when the individual surrendered his passport, visited the consulate in October, then was apprehended and removed (verified) in November.

Government (G) Site Locations: During Contract Year 2011, ERO and BI implemented a new model, called "G" site locations. G sites are an alternative to a stand-alone, full-service supervision office. G sites consist of an ISAP employee co-locating in an ERO office and performing the same services as at a full-service site. A G site employee conducts intake and orientations, office visits, home visits, assessments and individual service plans. ERO provides the necessary equipment, software, infrastructure and technical support services for these sites. During the contract year, BI opened five G sites. ISAP opened the first G site in Providence, RI. It opened in March 2011 within 30 days of site approval. This site grew quickly and provided the model for additional G sites in Tampa, FL, Bakersfield, CA, Marlton, NJ, and Charleston, SC. Each of these G sites met recommended supervision counts quickly. As anticipated, the formation of the G site model allowed ERO and BI case specialists to communicate frequently for a coordinated approach to participant services, including simplified referrals, resolution of participant issues, and other program efficiencies.

TECHNOLOGY-ONLY SUPERVISION

ERO created the ISAP technology-only option to offer an alternative where full-service supervision was not available. It has evolved to provide a tool for ERO to escalate and de-escalate participants between the full-service and technology-only options. Participants involved in the ISAP technology-only option do not receive the full-service supervision provided at the 40 ISAP locations. The technology-only option provides ERO personnel nationwide with two tools for location monitoring: GPS tracking and telephonic reporting. The GPS tracking system, BI ExacuTrack® One, is a sophisticated ankle-worn device that tracks a participant's movements and has many reliable tamper features that deliver alerts, if warranted. The telephonic reporting system, BI VoiceID®, helps ERO monitor compliance by making random and scheduled telephone calls to participants. VoiceID identifies participants through a biometric "voice print" and verifies the participant is where he or she is supposed to be throughout the day.

ISAP staff members can assist with participant enrollment, equipment installation and removal when there is an office in the area. ERO officers manage participant monitoring by logging on to BI's secure web portal and responding to violations as needed. ISAP program managers and BI's Monitoring Center Operations provide ERO officers with equipment training and 24-hour support.

ERO terminates participants in the full-service or technology-only ISAP supervision options when they comply with final court orders, voluntarily depart for their home country, or when they are released by ERO.

Monitoring technology supports departure verification

BI monitoring technology has many reliable tamper features that deliver alerts, if warranted. In one situation, ISAP staff received an alert from a GPS tracking device that the strap had been tampered with. In fact, by tracking the GPS data points, the device was located in a dumpster. Immediately, staff began reaching out to the participant's network of family and friends to locate the participant. ISAP staff, through a relative, was able to reach the individual in his home nation. ISAP staff then arranged a meeting between ERO and the participant. ERO was able to determine the individual had left the country, resulting in a verified departure versus an absconded case.

COMMUNITY CONNECTIONS

ISAP's success can, in part, be attributed to the support from our many community and non-governmental partners. These organizations provide invaluable services to ISAP participants and play a role in achieving positive outcomes. Though ISAP staff members are experienced, well educated and often well-versed in a variety of cultures, the program requires community assistance to achieve the greatest success.

ERO determines the supervision and services a participant will receive, but the ISAP case specialist is also able to make referrals to community-based organizations based upon an intake assessment. These assessments can identify a participant's basic life needs, which often need to be met before the participant can think about attending court hearings and complying with orders of supervision. Identifying these needs and referring participants to supportive agencies is an integral part of ISAP, and it would not be successful without the support of the many agencies who serve ISAP participants.

Each ISAP site has a community resource plan outlining the agencies able to serve participants. This includes agencies able to provide services for food, shelter, legal assistance, mental health, medical, transportation, and other basic life needs.

ISAP program managers reach out to community organizations to help them understand the program and how they might help. The responses have been phenomenal, and in the last year, participants have received an extensive list of meaningful services. A partial list of partner providers includes:

24 Hour Crisis Stabilization
Affordable Housing
Alcohol Drug Action
Alcoholics Anonymous
American Friends Service Committee
American Red Cross
Amtrak Rail Service
Angel Food Ministry
Baptist Immigration Center
CASA (Colombian American Service Assoc.)
Catholic Charities
Centers for Victims of Torture
Charlotte Housing Authority
Child & Family Reach Out Program
Child Protective Services
Coalition for Suicide Prevention
Dental Health Services
Denver Rescue Mission
Department of Homeless Services
Department of Public Health
Diocesan Migrant & Refugee Services, Inc.
ESL Language Centers
Family Health Services
Florida Immigrant Advocacy Center (FIAC)
Food Bank of San Diego
Food Pantry Community Missions
God's Food Pantry

Good Neighbors Health Care
Goodwill Industries
Greyhound Bus Lines
Healthcare for the Homeless, Inc.
Hispanic Migrant Ministry
Hope Clinic
Housing Authority
Housing Helpers
Housing & Urban Development
Immigration Counseling Services
Interfaith Ministries
Latin America Association
Legal Aid of Western Missouri
Medicare Advocacy Program
Morris County Dept. of Human Services
New Options for Violent Actions (NOVA)
Planned Parenthood
Public Health Department
Regional Transit Authority
Rocky Mountain Survivors Center
Salt Like City Office of Diversity Affairs
Salvation Army
San Diego Coalition for the Homeless
San Diego Rescue Mission
Spanish Catholic Canter Medical Clinic
Substance Abuse & Mental Health (SAMHSA)
The Neighborhood Center
Traveler's Aide (Hope Atlanta)
Turning Point
United Way
VIA Public Transport
Volunteers of America
Women, Infants & Children (WIC) Program

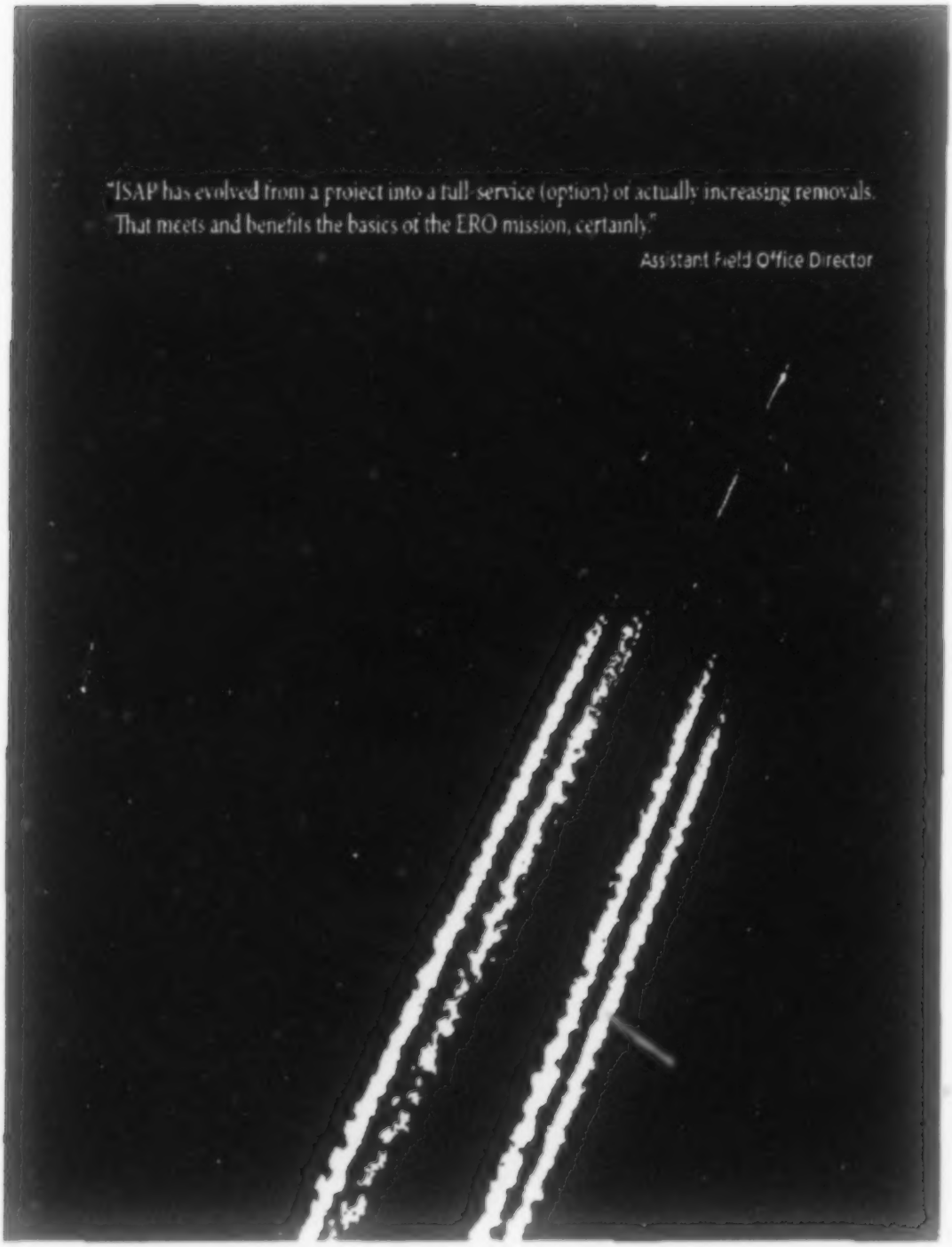
World Relief
YMCA
YWCA

"I have worked with the ISAP Kansas City office from the first day of the program. They are courteous, professional and easy to work with. They realize the importance of having legal assistance and consultation in these cases."

Suzanne Gladney, Managing Attorney
Legal Aid of Western Missouri
Kansas City, Missouri

ASSISTANCE WITH STABLE HOUSING

ERO and the program manager met with a habitual violator to assess how to ensure program compliance and determined that she needed a housing referral. The participant had an unstable living situation and had been associating with drug users. The program manager called Healthcare for the Homeless who prepared a stable residence for her until she files a change of venue and moves in with her mother in Texas.


"ISAP has evolved from a project into a full-service (option) of actually increasing removals. That meets and benefits the basics of the ERO mission, certainly."
Assistant Field Office Director

FINDINGS

The Intensive Supervision Appearance Program (ISAP) contract year was from Nov. 6, 2010 to Nov. 5, 2011. BI managed 40 locations for Enforcement and Removal Operations (ERO) during this contract year. The findings section reviews general statistics for the contract year, post-order removal data, and specific Executive Office for Immigration Review (EOIR) hearing data.

ISAP remains vigilant in facilitating participant attendance at all EOIR hearings, including hearings where final orders are rendered. By facilitating high attendance rates, ISAP builds trust in the court system and achieves favorable outcomes.

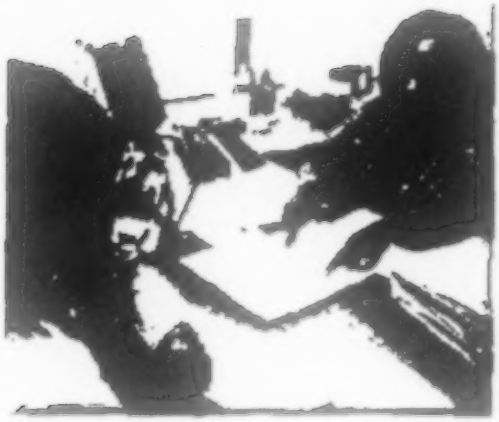
As part of the data review for Contract Year 2011 (CY 2011), ISAP outcomes are compared against benchmark data and results achieved in Contract Year 2010.

General Program Data

In Contract Year 2011, ISAP supervised 35,380 participants, a 37.2% increase from the previous year.

STATISTICS FROM 11/6/2010 - 11/5/2011

	FULL-SERVICE (FS)	TECHNOLOGY-ONLY (TO)	TOTAL
TOTAL SERVED	24,047	11,333	35,380
Active in Program as of 11/5/11	13,862	9,250	23,112
Terminated from Program between 11/6/10 and 11/5/11	10,185	2,083	12,268



Participant Termination Data

ERO defines 13 possible termination outcomes for ISAP participants. The following table displays results by termination type for these participants.

TERMINATION CODES

TYPE	DESCRIPTION	FS	TO
FAVORABLE OUTCOMES			
A	Departure Verified (Final Order of Removal)	1,126	203
B	Relief/Benefit Granted (Cancellation of Removal, Adjustment of Status, Asylum, or Admission)	603	168
L	Departure Verified (Voluntary Departure)	963	61
M	Departed the United States while in proceedings	121	5
NEUTRAL OUTCOMES			
G	No Longer Required to Participate (As determined by ERO for various reasons)	5,429	1,033
H	Arrested by ICE for Removal (Final Order - Active Participant)	99	63
I	Pending Departure Verification (Final Order of Removal or Voluntary Departure)	147	31
J	Arrested by other Law Enforcement Agency	640	89
K	Other (No longer required to report: medical or deceased)	133	27
UNFAVORABLE OUTCOMES			
C	Pre-Order Program Absconder (Terminated from ATD)	395	40
D	Post-Order Program Absconder (Terminated from ATD)	405	142
E	Pre-Order Program Violator	107	56
F	Post-Order Program Violator	17	165
TOTAL		10,185	2,083

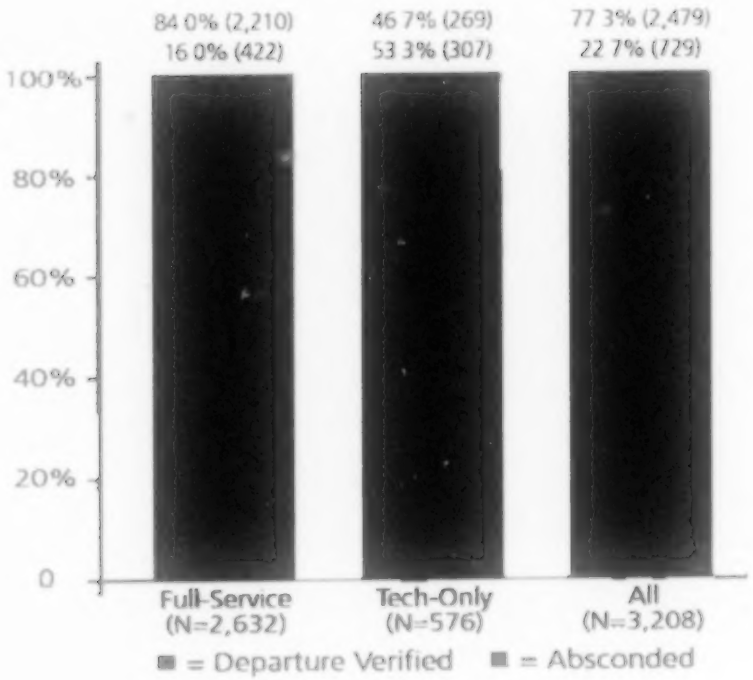
Findings Note: These results cover the ISAP contract year and will differ from the Government Fiscal Year. In addition, the results do not include changes that may have occurred after a participant was terminated from ISAP. The Government's database will have these updates.

Removal Outcomes

ISAP has been successful in facilitating removal. Two sets of removal calculations—one based on an ERO formula and another based on removal calculations from previous ISAP years (to allow comparison against a 2003 Office of Inspector General benchmark study), produce consistent results.

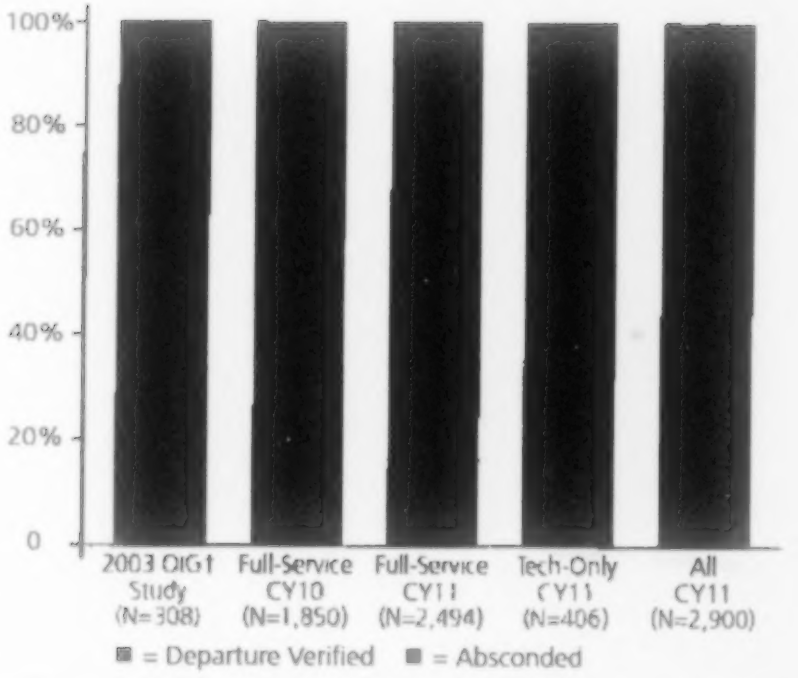
ERO Formula

Based on an analysis of 2,632 participants in the full-service supervision option who received a final order to depart the country/departure verified (Type A); departed voluntarily (Type L); departed while in proceedings (Type M); absconded (Type D); or program violator (Type F), ISAP achieved an 84.0% rate of compliance. Based on an analysis of 576 participants in the technology-only supervision option who received a final order to depart the country/departure verified (Type A); departed voluntarily (Type L); departed while in proceedings (Type M); absconded (Type D) or program violator (Type F), ISAP achieved a 46.7% rate of compliance. When combining participant termination counts for individuals in both the technology-only option and full-service option (3,208 individuals, types A, L, M, D, F), ISAP achieves a 77.3% compliance rate.



OIG Study Benchmark

The OIG study benchmark allows for a comparison against pre-ISAP benchmark data. Of 2,494 participants in the full-service supervision option who received a final order to depart the country/departure verified (Type A); departed voluntarily (Type L); or absconded (Type D), ISAP achieved an 83.8% rate of compliance. Based on an analysis of 406 participants in the technology-only supervision option who received a final order to depart the country/departure verified (Type A); departed voluntarily (Type L); or absconded (Type D), ISAP achieved a 65.0% rate of compliance. When combining participant termination counts for individuals in both the technology-only option and full-service option (2,900 individuals, types A, L, D), ISAP achieves an 81.1% compliance rate, far exceeding an OIG study that found that individuals complied with only 13.0% of final EOIR court orders in 2003.



† Immigration and Naturalization Service's Removal of Aliens Issued Orders, Report #1-2003-004

Findings Note: These results cover the ISAP II contract year and will differ from the Government Fiscal Year. In addition, the results do not include changes that may have occurred after a participant was terminated from ISAP. The Government's database will have these updates.

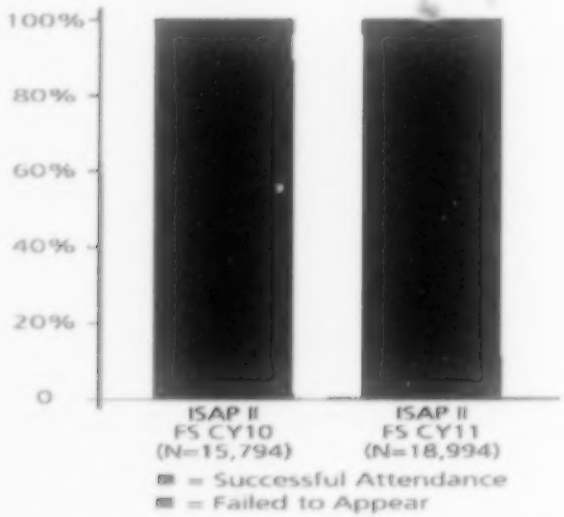
HEARING ATTTENDANCE—FULL SERVICE PARTICIPANTS

Full-Service
EOIR Hearing Data—All Hearings

Since its inception, ISAP has focused on delivering firm, fair and consistent services for participants. This approach aligns with ERO's mission to deliver a flight-mitigation program that increases compliance with release conditions, facilitates participant compliance with court hearings and final orders of removal while allowing individuals to remain in the community.

As a result, ISAP focuses on facilitating attendance at all EOIR court hearings, including hearings where final decisions are rendered. ERO does not track hearing attendance for technology-only participants and this section covers ISAP full-service attendance only.

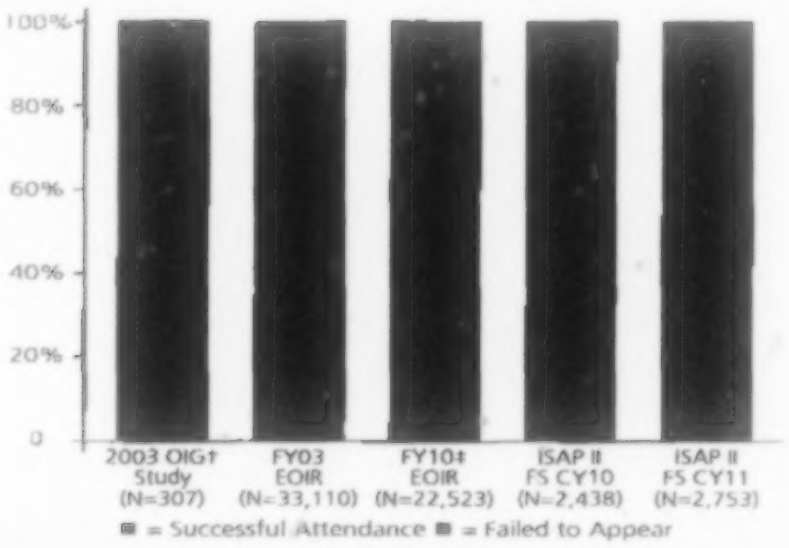
Consistent with previous contract years, in CY 2011 ISAP achieved an excellent 99.4% full-service participant attendance rate at all EOIR hearings. Of 18,994 hearings for participants during the year, participants attended all but 109.



Full-Service
EOIR Hearing Data —Final Hearings

At hearings where final decisions were rendered, ISAP also achieved an excellent 96.0% compliance rate for full-service participants. Of 2,753 final order hearings during the year, participants attended all but 109 as well. These rates far exceed compliance rates before ISAP was implemented. For example, the 2003 OIG study, which included a population similar to participants involved in ISAP, found only 33.6% of individuals attended final hearings. Another report from 2003, the EOIR Statistical Year Book, which included a broader group of participants than the OIG study, found 59.4% of individuals attended final court hearings.

In 2010, there were 22,523 EOIR hearings. Of these hearings, individuals attended 17,870, a compliance rate of 79.3%.



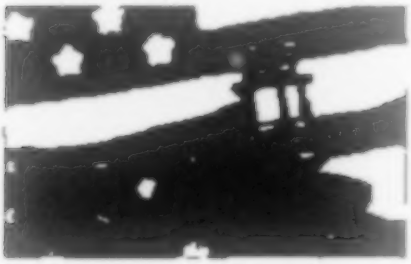
† Immigration and Naturalization Service's Removal of Aliens Issued Orders, Report #I-2003-004

‡ Executive Office for Immigration Review, FY 2010 Statistical Year Book. Note change in methodology - administrative closures are no longer included to calculate failure to appear rate. As of 2009 EOIR only uses IJ decisions and orders in absentia

Findings Note: These results cover the ISAP II contract year and will differ from the Government Fiscal Year. In addition, the results do not include changes that may have occurred after a participant was terminated from ISAP. The Government's database will have these updates.

* Hearing attendance data not available for Technology-Only.

ISAP II AND ERO PARTNER TO IMPROVE HEARING ATTENDANCE



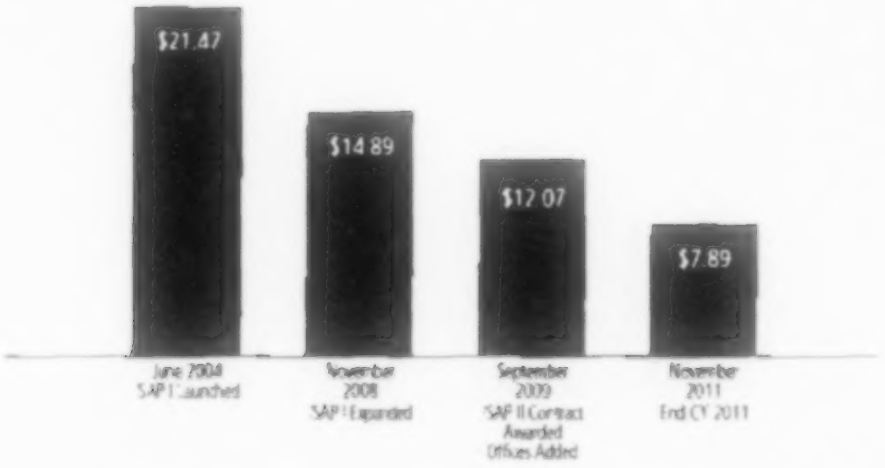
An ISAP task force was implemented to address offices below a 94% hearing attendance rate. The group identified the unique challenges faced in each location. They shared ideas on what had worked in other locations and ways to overcome barriers participants face in attending their court hearings. Specifically, the San Bernardino office, in partnership with local ERO, was the lead office in re-developing the supervision protocol to achieve maximum EOIR attendance. An analysis was conducted on historical absentia orders, and the results identified the most common barriers to hearing attendance as: unreliable transportation and/or directions, last-minute emergencies, forgotten appointments, and fear of attending.

To counter these barriers, ISAP II staff increased their efforts to prepare participants for hearing attendance by demystifying the EOIR process, confirming hearing

dates/times and reminding participants at each face to face visit, confirming three transportation plans in advance of the hearing, conducting one week and 24-hour court reminder calls and/or unannounced home visits, and tracking the participant's GPS points the day of scheduled hearings.

The implementation of these initiatives has produced quantifiable improvement in hearing attendance rates across the country.

ISAP FULL-SERVICE COSTS DROP OVER TIME



As the number of participants in the full-service option has increased since ISAP was implemented in 2004, the cost to administer the program has dropped significantly. In 2004, the daily participant rate was $21.47. At the end of CY 2011, the daily cost per participant had dropped to $7.89 per day.

Visas
Departure
EXIT

LESSONS LEARNED

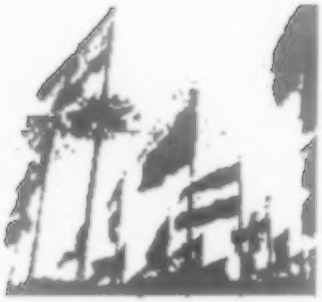
BI offers the following observations and lessons learned for the Intensive Supervision Appearance Program (ISAP) Contract Year 2011. We base these on experience operating this program for Enforcement and Removal Operations (ERO) and feedback from ISAP program managers, ERO and non-governmental and community-based organizations.

- ISAP facilitates **excellent attendance rates** at Executive Office for Immigration Review (EOIR) hearings and compliance with removals, if ordered by the court.
- ISAP continues to be a **flexible option** for managing the non-detained population. A survey of ERO staff that work with ISAP unanimously stated the program is a valuable ERO program.
- ISAP has become a **trusted alternative** to detention for ERO, allowing ERO officers to manage large caseloads and specific cases that require immediate attention.
- Once ERO refers individuals to ISAP, focusing on **obtaining travel documents** as soon as possible helps facilitate timely compliance with removal orders.

- The ISAP full-service option generates higher final **order compliance** than the technology-only option.
- We learned that adding **Government "G" site locations**, where BI co-locates ISAP staff in ERO offices, can be done within 30 days of site approval. During the year, BI implemented five G sites. Feedback on these sites indicates these sites facilitate good communication, efficient operations, and effective participant services.
- **Ongoing communication** between ERO and ISAP facilitates coordinated and cost-effective outcomes. For example, ISAP offices provide a daily participant violation report to the local ERO office to respond quickly to non-compliant behavior.
- We have learned that **increasing the level of supervision and communication** with participants prior to final court hearings facilitates appearances at these important hearings. For example, a pre-final court hearing reminder has been an effective enhancement.
- **Home visits**, as performed in the ISAP full-service option, provide excellent details about a participant's life and a window into this individual's flight risk.
- Placing ISAP offices within **close proximity to ERO offices** facilitates easy enrollment and frequent communication.
- Educating EOIR judges on ISAP facilitates more **timely outcomes and saves money.** In locations where EOIR installs new judges, a drop in efficiency has been noted.

- Working with **local NGOs and community-based organizations** is an important and ongoing responsibility for ISAP sites. Establishing and maintaining open channels of communication with these organizations facilitates referrals for necessary participant services. By connecting participants with vital community services, such as shelter, food or health services, they stabilize in the community and better engage in the EOIR process.
- We have learned that **contract modifications** can be effective at adapting and evolving to immigration challenges. These modifications, such as adding phase flexibility and allowing the cellular option for individuals on telephonic reporting, keep the program relevant.
- Treating participants with **dignity and respect** enhances compliance to program guidelines and outcomes.

RECOMMENDATIONS



We believe the following recommendations would enhance the Intensive Supervision Appearance Program (ISAP). These are based on operational experience and feedback from staff, Enforcement and Removal Operations, and non-governmental organizations (NGOs).

- We recommend that **more Government, known as "G" sites, be added.** These sites are an alternative to stand-alone, full-service supervision locations, they can be implemented in just 30 days, and they allow more participants to be served in more geographic locations. By being collocated in an ERO office, G sites also facilitate effective communication between ISAP and ERO.

- We recommend **ERO attend future technology training forums,** such as the session hosted at the BI National Monitoring Operations center this year. Location monitoring technology is continuously updated; understanding these changes can be helpful as BI incorporates these enhanced systems into program operations.

- We recommend that **training programs for ISAP staff** continue to include information on the removals process and ongoing refreshers on immigration law. By continuing to understand and align with ERO's mis-

sion, ISAP staff can effectively support this partnership.

- We recommend ERO develop a **training program for new EOIR judges** that promotes moving ISAP cases through the docket efficiently, thereby saving money and enhancing outcomes.
- We recommend that ISAP staff conduct **open houses on a regular basis** for local NGOs and community-based organizations. By facilitating open communication and an understanding of each other's mission, ISAP can better connect participants with services.
- We recommend **additional benchmarks** be developed to refine analysis of the ISAP full-service and technology-only supervision options.

ABOUT BI INCORPORATED

Established in 1978, BI Incorporated works with approximately 900 U.S. governmental agencies. In addition to managing ISAP since 2004, BI provides a full continuum of location monitoring systems, monitoring services, and treatment and day reporting services for offenders in residential, non-residential or in-custody settings. BI works closely with community corrections and immigration officials to cost effectively reduce recidivism and promote public safety. BI is a wholly owned subsidiary of The GEO Group, a global leader in corrections.

BI INCORPORATED ISAP II FULL-SERVICE (FS) & GOVERNMENT (G) SITES

ISAP II Full-Service Supervision Offices:

Atlanta	Newark
Baltimore	New Orleans
Boston	New York City (4)
Buffalo	Orlando
Charlotte	Philadelphia
Chicago	Phoenix
Dallas	Portland
Delray Beach	Salt Lake City
Denver	San Antonio
Detroit	San Bernardino
El Paso	San Diego
Hartford	San Francisco
Houston	Santa Ana
Kansas City	St. Paul
Los Angeles	Seattle
Miami	Washington, D.C.

ISAP II Government Sites:

Bakersfield	Providence
Charleston	Tampa
Manton	

BI INCORPORATED ISAP II TECHNOLOGY ONLY (TO) SITES

ISAP STAFF SPOTLIGHT

[REDACTED]

"I enjoy helping participants understand and navigate the immigration system. Based on my family's positive experience—complying with rules, filling out the forms, and seeing the system work—I aim to have participants comply too. If I did it, they can too."

Jocelyne wanted to work in immigration since her family moved to Boston from the Democratic Republic of Congo a decade ago. While she was in high school, her family was selected in the U.S. Diversity Immigrant Visa Program lottery. She continued her education in Boston, earning a criminal justice degree from University of Massachusetts. She has counseled and administered case management services for juvenile delinquents, which prepared her for her ISAP role. Jocelyne speaks French, Spanish, English and Lingala.

[REDACTED]

"I aim to be helpful and treat participants with dignity and respect. We help in many ways, and the relationships we build help avoid problems, gain trust and get results. Recently an individual, though terminated from ISAP, wrote a letter saying he appreciated our treatment."

Vincenia joined ISAP in Charlotte as a case specialist and was soon promoted to program manager. Vincenia has worked with federal, state, criminal justice and child welfare services, including time as a probation officer and civilian personnel clerk for the Navy. She also tutored in the America Reads program for young students and linked juvenile clients with the U.S. Marine's mentoring program for at-risk children. She has a master's degree in Urban Studies and bachelor's in Criminal Justice from Old Dominion University.

[REDACTED]

"ISAP saves the government a lot of money. Many participants are ideal candidates for an alternative to deten-

tion. They can live in the community and support their families while we help them through the immigration process."

Diana is involved in daily office activities, like installing or answering questions about GPS tracking, giving directions to services, coordinating information between case specialists and participants, even making court reminder calls. Participants in Chicago are often of Eastern European and Hispanic descent, so she applies her five languages—Ukrainian, Polish, Spanish, Russian and English. A Ukraine native, Diana cares about helping others, and believes in alternatives to detention. She has a political science degree and has taken national security classes at DePaul University.

[REDACTED]

"I use my educational training in ISAP, including counseling, working with referral organizations, and using the local network to stabilize participants in the community. I believe in treating people with dignity and respect, but I am also here to help them follow through and hold them accountable."

Kiana tells her two young daughters to reach high, and she, too, sets high goals in her commitment to her community and work. During Hurricane Katrina, her family was displaced to Houston. There, she joined the Texas

Department of Criminal Justice as a parole officer. Ten months later, she returned home and earned her master's in Social Work from Southern University, having previously earned her criminal justice degree. She completed internships at the U.S. Probation Office and the New Orleans Criminal Court Mental Health Program, prior to joining the ISAP team.

[REDACTED]

"I keep learning about the challenging but interesting immigration process, and I like working with the participant population. We build rapport with them, help them understand the system, keep them from absconding and compliant with court orders. We make a positive impact."

Raised in the border town of San Luis, Arizona, Alan uses his knowledge of the area and the participant population, helping participants connect with the Mexican consulate and obtain departure papers as needed. Bilingual in English and Spanish, Alan earned his sociology degree from Arizona State University. He was previously a security officer.

[REDACTED]

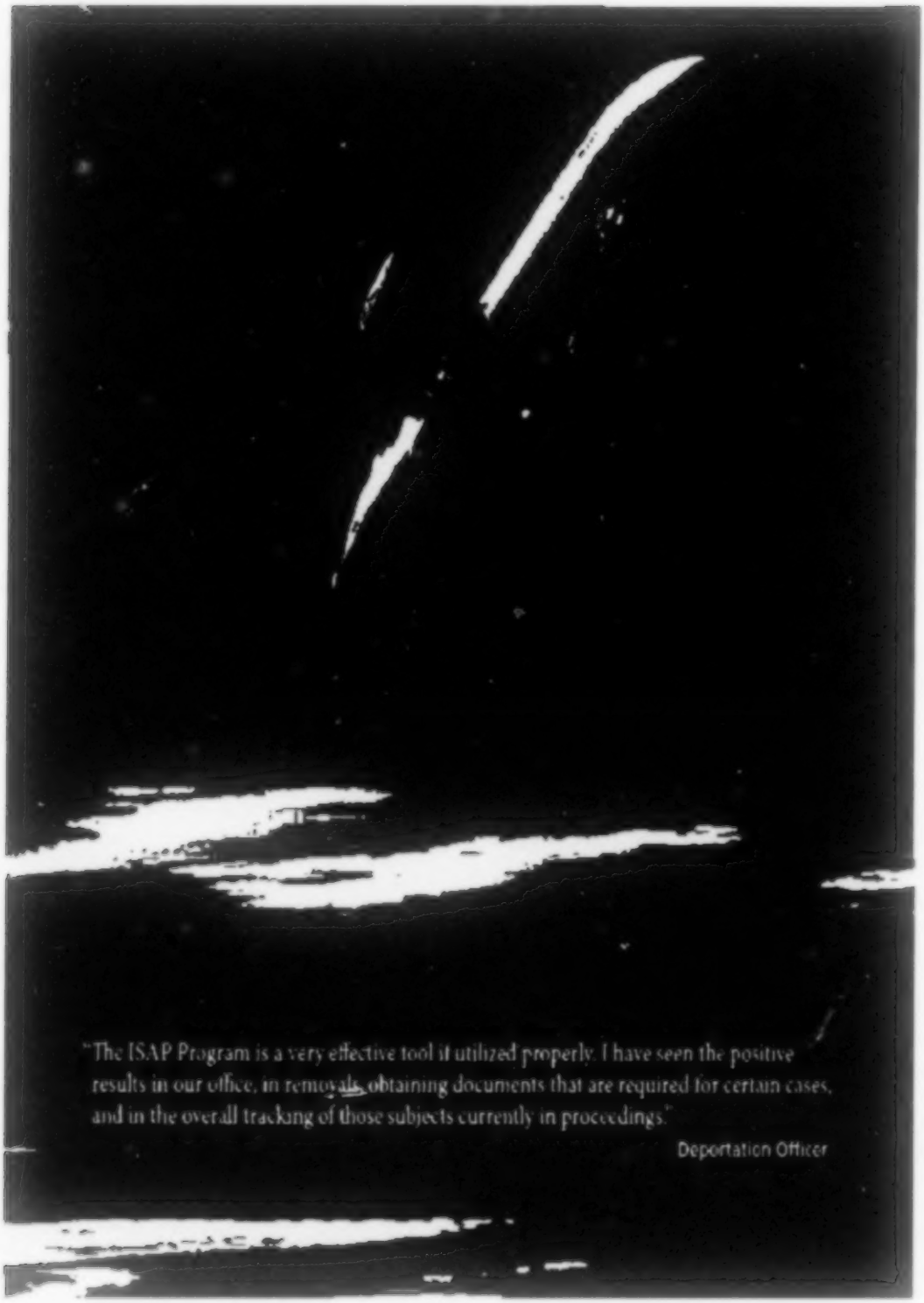
"I like what I do because the work is always evolving and the challenges are different. Each participant has a unique background, different cultural influences or circumstance, requiring a new approach. In working with them, I keep this in mind."

Eduardo joined the ISAP team seven years ago. He has worked in several offices, including Miami, San Bernardino, and Charlotte, and has helped ISAP expand. He also assisted Phoenix, Santa Ana, Baltimore and others. Born in Peru, he emigrated to Florida in 1995. He uses his multilingual abilities (he speaks English, Spanish, Portuguese and basic French) to connect with the diverse ISAP population. Eduardo earned a bachelor's degree in Psychology and master's in Social Work from Florida International University.

Staff reaches overseas to complete the job

Sometimes, ISAP staff go beyond our borders to complete the job. For example, a participant from the Philippines complied with his voluntary departure and returned to his home nation in June. The ISAP case specialist noticed a discrepancy in his itinerary and, as a result, his departure could not be verified using ERO software. By requesting the individual provide his email address prior to removal, the case specialist was able to

follow up with the participant, learn that he had become sick upon return home, and request he submit verification to the American embassy as soon as possible. ERO informed ISAP his departure was verified the next day.


"The ISAP Program is a very effective tool if utilized properly. I have seen the positive results in our office, in removals, obtaining documents that are required for certain cases, and in the overall tracking of those subjects currently in proceedings."
Deportation Officer

While educated assumptions about why ISAP has been successful are relevant, they have not yet been validated. The purpose of this study was to understand factors that have affected these outcomes.

APPENDIX: SUPPLEMENTAL REPORT

There is a lack of research exploring the effective management of the non-detained, undocumented immigration population in the United States. BI Incorporated, with the expertise and oversight of Dr. Jeffrey Lin, assistant professor of sociology and criminology at the University of Denver, has completed a statistical study of the Intensive Supervision Appearance Program (ISAP). While educated assumptions about why ISAP has been successful are relevant, they have not yet been validated. The purpose of this study was to understand factors that have affected these outcomes. In this study, we examined (1) factors that predict removal and (2) flight risk (i.e. risk of absconding), using ISAP participants from the full-service component of the program, or those individuals receiving intensive case management services as they navigate the immigration court process. The study did not include ISAP participants from the technology-only component.

This study used data collected on ISAP participants who were terminated between November 8, 2009 and No-

vember 5, 2011, and were not terminated as Term Code G. The study identifies factors that predict (1) compliance with removal orders and (2) flight risk. Participants in this study were referred to ISAP by Enforcement and Removal Operations (ERO) officers. ERO is a division of Immigration and Customs Enforcement (ICE) and the Department of Homeland Security (DHS).

Multivariate statistical analyses were conducted on this data to identify factors that predicted compliance with removal orders and flight risk while in ISAP. The participants in this study were members of the larger non-detained, undocumented immigrant population in the United States managed by ERO. The non-detained population consists of approximately 1.6 million undocumented immigrants (Enforce Alien Removal Module, ICE's system of record, December 30, 2011). Participants were adults, and upon entering ISAP, received an intake, orientation, and assessment, followed by the development of his or her Individual Service Plan (ISP).

Findings related to removals

Key study findings related to removals include:

Program factors were the most powerful and significant predictors of successful removal, especially the use of technology and status at intake. Status at intake was reflective of the participant's level of supervision while in ISAP.

- Compared to participants without technology, those with GPS tracking systems installed had 7.4 times higher odds of removal. Those with Telephonic Reporting (TR) had a 3.4 times higher rate of successful removal.

- Status at intake—a participant's legal stage in the immigration court process—was also predictive of successful removal. Participants with post-order, appeal, or POCR-RFR status were more likely to be removed when compared to pre-order participants. The highest level of supervision was most predictive of successful removal. Possibly, the legal stage was the predictor; the level of supervision was the predictor; or both.

Demographic characteristics were also powerful predictors of successful removal.

- Age was the most predictive variable. Younger participants were more likely to depart. Compared to participants between 18 and 30 years old, those between 31 and 44 had 22.8% lower odds of removal and those 45 and older had 29.3% lower rate of removal.
- Women were more likely to successfully depart than men.
- Participants from Mexico were more likely to depart to their home nation when compared to participants from Central/South America, Africa, Europe, and Asia.

Legal factors were also predictive of successful removal.

- Participants without a criminal history had 21.5% higher odds of departing than those with at least one criminal conviction.
- Participants referred from detention were more likely to depart than those referred from the criminal alien program.

While social characteristics were not as predictive as other variable categories, they did yield some interesting findings.

- Participants with motorized transportation were more likely to depart than those without motorized transportation.
- Compared to non-high school graduates, those with some college education were more likely to depart.
- Participants requiring an interpreter were more likely to be removed than participants proficient or fluent in English.
- Participants with fewer non-family contacts had a higher likelihood of departure than those with a higher number of non-family contacts.
- Unemployed participants were more likely to depart than employed participants.

Findings Related to Participants Who Absconded

In contrast to the successful removal model, in which program factors provided the most explanatory power, social characteristics best predict when a participant would abscond. Variables that were associated with increased absconding provide insight for case specialists to decrease participant flight risk.

Key study findings include:

Certain social characteristics were able to best predict absconding.

- Participants who were proficient or fluent in English had 15.9% and 34.3% lower odds, respectively, of absconding than participants requiring or having an interpreter recommended

- Participants had 1.4 times higher odds of absconding if they had received a higher number of program referrals.
- Participants with motorized transportation had 1.3 times lower odds of absconding than participants without access to their own motorized transportation, and participants renting their homes had 1.3 times higher odds of absconding than participants who owned their homes.
- Participants who reported a low number of family and non-family contacts were more likely to abscond. Employed participants were less likely to abscond than unemployed participants.

Demographic, program and legal characteristics had predictive effects on absconding as well.

- A male participant had 1.4 times higher odds of absconding than a female participant. Also, participants between the ages of 18 and 30 were more likely to abscond than participants older than 31.
- Participants in the Central and South American regions were more likely to abscond than those from Mexico (other countries showed no significant differences).
- Participants on GPS tracking were less likely to abscond than those not on GPS.
- Participants with a post-order status at intake were less likely to abscond than those with a pre-order status. Post-order status participants received a higher level of supervision than pre-order participants. Possibly, the legal stage was the predictor; the level of supervision was the predictor; or both.

- Being referred from the criminal alien program and not having an attorney were both powerful and significant predictors of absconding. Participants referred from the criminal alien program had 1.7 times higher odds of absconding than those referred from detention. Participants who did not have an attorney had 1.6 times higher odds of absconding than those who did have an attorney.

Study Recommendations

This study provided insights for possible improvements to the ISAP model, including:

1. The study results indicated that several variables predicting successful removal are operating differently from those predicting flight-risk. Therefore, developing two validated assessment tools that predict (1) successful removal and (2) absconding is recommended.

2. Use the factors identified from these assessment tools to develop the participant's supervision plan.

3. Given the apparent effectiveness of the use of technology with the full-service supervision component on outcomes, additional research is suggested for participants in the technology-only component. The annual report outcomes clearly revealed the use of technology alone is not as successful in securing removals or mitigating absconding as the integration of the full-service case management model. Additional research comparing full-service and technology-only would provide a more purified measure of technology's effectiveness.

4. While this study looked specifically at successful removals and absconding, appearance at final hearings is another important milestone in overall program success. It is recommended that an analysis of final hearing attendance be considered as an addendum to this study.

5. Deeper understanding of the findings might be enhanced by integrating geographic indicators (such as ISAP office location) as independent variables.

Exhibit I

U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Statistics

[SEAL OMITTED]

SPECIAL REPORT

NOVEMBER 2012 NCJ239243

Pretrial Release and Misconduct in Federal District Courts, 2008-2010

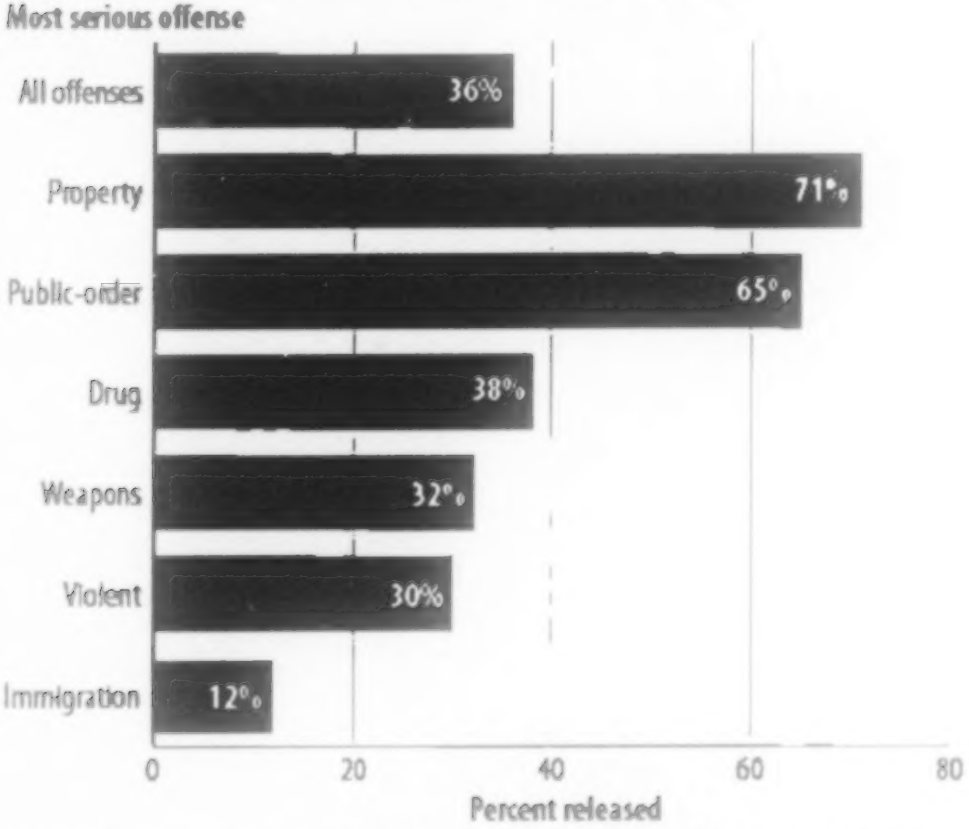
Thomas H. Cohen, Ph.D., *BJS Statistician*

During fiscal years 2008 through 2010, 36% of the 283,358 defendants in cases disposed in federal district courts were released prior to case adjudication. The percentages of pretrial release ranged from 12% for defendants brought into federal courts for immigration violations to 71% for defendants charged with property offenses (figure 1). Nineteen percent of released defendants committed some form of pretrial misconduct, and technical violations accounted for 90% of these pretrial violations.

Data for the Bureau of Justice Statistics' (BJS) Federal Justice Statistics Program (FJSP) were provided by the Administrative Office of the U.S. Courts' (AOUSC) Office of Probation and Pretrial Services Automated Case Tracking System (PACTS). The PACTS data cover various aspects of pretrial release in federal district courts, including the decision to release or detain a defendant, the different mechanisms of release or detention, and the behavior of defendants while on pretrial release. The PACTS data analyzed for this report include defendants whose

cases were disposed by the federal courts for the combined fiscal years of 2008 to 2010.

FIGURE 1
Defendants released pretrial for cases disposed in federal district courts, by offense type, FY 2008–2010



Source: Administrative Office of the U.S. Courts, Office of Probation and Pretrial Services Automated Case Tracking System, 2008–2010.

HIGHLIGHTS

- Thirty-six percent of defendants in cases disposed in federal courts from 2008 to 2010 were released pretrial.
- Federal courts released 10% of noncitizen defendants identified as illegal aliens, compared to 43% of legal aliens and 55% of U.S. citizens.

- Twenty-four percent of these defendants were released at the time of their initial appearance, while another 12% were detained and then released at subsequent court events, including detention or bond hearings.
- Nonfinancial methods, including release on personal recognizance or unsecured bond, accounted for 73% of pretrial releases in federal courts.
- Ninety-one percent of detained defendants were held on either court-ordered detention or because they could not meet certain conditions set by the court.
- Of defendants released pretrial, 79% were released with conditions, including travel restrictions, substance abuse treatment requirements, weapons restrictions, or promises to remain employed or seek employment.
- About half (51%) of defendants with no prior arrest history were released pretrial, compared to 34% of defendants with 2 to 4 prior arrests and 21% of defendants with more than 10 prior arrests.
- Nineteen percent of defendants released pretrial committed some form of pretrial misconduct.
- Technical violations were committed by 17% of defendants released prior to case disposition, while 1% of released defendants failed to make court appearances and 4% were rearrested for new offenses.

The PACTS data provide important information about pretrial release and misconduct in the nation's federal courts. These data do not cover pretrial release in state courts. In an effort to provide comprehensive information on pretrial release, this report compares

several aspects of the pretrial process in federal and in state courts. While no statistical series have national level estimates of pretrial release and misconduct in state courts, BJS has sponsored the State Court Processing Statistics (SCPS) project, which examines pretrial release and misconduct for felony cases filed in the nation's 75 most populous counties. Therefore, the SCPS data are referenced in this report when comparing state and federal pretrial statistics. (See *Methodology* for more information about the SCPS.)

Pretrial release and detention in the federal criminal justice system

Before 1966, the federal courts relied almost exclusively on financial bond. In a bond system, persons accused of criminal conduct can remain free pending case disposition by posting a bond, usually property or money, as a guarantee that they will make all court appearances. In most situations, defendants will post a percentage of the bond set with a bail bondsman or with the court through a deposit bond program. Congress enacted the Bail Reform Act of 1966 to reform federal pretrial practices and minimizing the use of financial bond. The act mandated that any defendant charged with noncapital offenses in federal courts be released on either their own recognizance or an unsecured appearance bond (see *Methodology*). In cases that required additional supervision, the court could impose other conditions necessary to assure that a defendant made all court appearances.

The Bail Reform Act of 1984 (18 U.S.C. Section 3141) further codified the pretrial release process. According to the act, when defendants first appear before a judicial officer they may be 1) released on personal

recognizance or unsecured bond, 2) released subject to conditions imposed by the court, 3) temporarily detained to permit deportation, exclusion, or the revocation of previously granted conditional release, or 4) detained pending the outcome of a detention hearing. At a detention hearing, the government is required by the act to prove by clear and convincing evidence that no condition of release would reasonably ensure that the defendant would appear for trial and not pose a risk to the community. The Bail Reform Act of 1984 also expanded the scope of factors that federal courts could consider when making pretrial release decisions to include the degree of dangerousness a defendant poses to the community.

* * * * *

17% of federal defendants released prior to case disposition committed technical violations

Technical violations (such as violations of pretrial conditions, including drug test failure or failure to maintain electronic reporting requirements) were committed by 17% of defendants released prior to case disposition from 2008 to 2010 (table 11). Defendants released on weapons (30%), drug (25%), and violent (24%) offenses had the highest rates of technical violations, while immigration defendants released pretrial had the lowest rates of violating their pretrial conditions (6%). The relatively low rate of technical violations for immigration defendants may be due to federal courts typically not attaching pretrial conditions to these defendants when released prior to disposition.

From 2008 to 2010, relatively few released defendants either failed to make court appearances (1%) or were rearrested for new offenses (4%). The percentage of defendants with missed court appearances did not exceed 2% across the major offense types. Rearrest percentages ranged from 1% for immigration defendants to 8% for weapons defendants.

Fifty-six percent of defendants who committed misconduct had their release revoked by the federal courts (not shown in table). Twenty-one percent of released weapons and more than 15% of violent (18%) and drug (16%) defendants had their release revoked, while less than 10% of released property (7%), public-order (6%), and immigration defendants (4%) had a pretrial release revocation.

In comparison, a third of released defendants in the nation's 75 most populous counties committed some form of pretrial misconduct during 2006. Half of pretrial misconduct events involved bench warrants that were issued due to missed court appearances, while a similar percentage of defendants with pretrial misconduct were rearrested for new offenses committed during the pretrial release period (not shown in table). In 2006, the percentage of defendants charged with pretrial misconduct was highest for drug defendants (37%) and lowest for those released after being charged with a violent offense (26%) (not shown in table).

TABLE 11
Behavior of defendants released pretrial for cases disposed in federal district courts, by offense type, FY 2008–2010

Most serious offense charged	Number of released defendants	Percent of released defendants who had—				
		At least one violation	Failed to appear	Technical violations of bond conditions	A rearrest for new offense*	Release revoked
All defendants	101,622	19%	1%	17%	4%	11%
Violent	2,660	26%	1%	24%	4%	18%
Property	31,332	15%	1%	13%	3%	7%
Fraudulent	25,378	14	1	12	3	7
Other	5,954	16	1	14	3	9
Drug	31,887	28%	2%	25%	5%	16%
Trafficking	26,683	29	2	26	6	17
Other	5,204	24	2	23	4	12
Public-order	15,058	12%	1%	11%	2%	6%
Regulatory	2,818	10	1	9	2	5
Other	12,240	12	1	11	2	6
Weapons	7,127	33%	2%	30%	8%	21%
Immigration	11,939	7%	1%	6%	1%	4%

Note: Detail will not sum to total because a defendant could have more than one type of violation. Information on offense type available for 98.4% of released defendants.

*Includes felony and misdemeanor offenses.

Source: Administrative Office of the U.S. Courts, Office of Probation and Pretrial Services Automated Case Tracking System, 2008–2010

Declaration of Susan B. Long

I make this declaration based on my own personal knowledge and if called to testify I could and would do so competently as follows:

1. My name is Susan B. Long. I am Associate Professor of Managerial Statistics at the Martin J. Whitman School of Management at Syracuse University. I have been retained by counsel for Petitioners as an expert in this matter.

2. In my capacity as an expert, I reviewed the expert report of Dr. Chester Palmer, submitted by the Respondents in this case. In the course of reviewing Dr. Palmer's analysis of continuance data, I discovered significant inconsistencies between the data relied on by Dr. Palmer for his analysis and the database information produced to the Petitioners in this matter. I summarized those inconsistencies in my Rebuttal Expert Report.

3. I have reviewed the Declaration of Benjamin McDowell, submitted in connection with the Respondents' Motion for Summary Judgment, which purports to explain the inconsistencies in Respondents' data. I have also reviewed Mr. McDowell's prior declarations submitted in this action and the transcript of his deposition taken on December 19, 2011, as well as information produced by Respondents in discovery regarding the Executive Office of Immigration Review ("EOIR") database from which the information for Dr. Palmer's analysis was drawn. In addition, through my work as the Co-Director of the Transactional Records Access Clearinghouse at Syracuse University, I have gained extensive experience and knowledge of the

databases maintained by EOIR. A summary of my relevant experience is contained in the appendix to my Expert Report.

4. Mr. McDowell's declaration contains new information about the EOIR database and EOIR data entry practices that had not previously been disclosed by Mr. McDowell or the Respondents in this matter. Based on this new information, it is clear that at least two of the assumptions underlying Dr. Palmer's analysis of the amount of time attributable to "alien-caused" delays are false.

5. First, Mr. McDowell's declaration clarifies that the field "ADJ_DATE" in the Schedule Table refers to the date on which a hearing is *scheduled*, not the date on which a hearing in fact takes place or the date on which the adjournment is requested and/or granted. This is apparent from an example provided in Mr. McDowell's declaration at paragraph 13. There he explains that to match the particular date shown in the Schedule Table with an adjournment shown in the Actions Table, you cannot rely on the ADJ_DATE recorded in the Schedule Table. Instead you need to use an entirely different date field ("UPDATE_DATE") from the Schedule Table—a date field Dr. Palmer did not use based on his own description of his analysis. Using this entirely different field, Mr. McDowell shows that the scheduled September 2, 2010 hearing date was actually adjourned on August 30, 2010—three days prior to the date of the scheduled hearing as reflected in the Schedule Table. As the Action Table for this case shows, a motion for contin-

uance was granted and the adjournment entered on the earlier of these two dates.[1] The entries corresponding to the scheduled September 2, 2010 hearing date from paragraph 13 of Mr. McDowell's declaration and from Exhibit 3 from the deposition of Dr. Palmer record the following sequence of events.

EOIR Schedule Table [from McDowell Declaration Para 13 showing new field]

(emphasis added)

IDNCASE	ADJ_RSN	ADJ_DATE	UPDATE_DATE
6566575	12	9/2/2010	9/1/2010

EOIR Actions Table [from Exhibit 3 of the November 27, 2012 deposition of Dr. Palmer]

IDNCASE	IDNACTION	DATACTION	STRDESCRIPTION	STRREACTION
6566575	34811435	30-Aug-10	Motion for a Continuance	Filed
6566575	34816223	30-Aug-10	Motion for a Continuance Disposition Entered	GRANTED
6566575	34816230	30-Aug-10	Adjournment	Added
6566575	34869451	01-Sep-10	Adjournment	Edited

Thus, by his own testimony, McDowell demonstrates that his prior statements indicating that "[t]he Schedule Table identifies . . . *when* a hearing was adjourned (ADJ_DATE)," are not correct. *See* Dkt. 299-1 ¶ 3 (emphasis added). *See also id.* at Exh. A ¶ 4; *id.* at Exh. B ¶ 4. In fact, according to his new

[1] A change in the adjournment information, but not the date of the adjournment, also was made the following day, September 1, when adjournment information was edited. McDowell uses this fact in matching up the UPDATE_DATE in the record from the Schedule Table to the corresponding set of entries in the Action Table.

declaration, the Schedule Table may identify when a hearing is originally scheduled, but that date may change based on information contained in the Update field.

6. Dr. Palmer's analysis is premised on an assumption that the "ADJ_DATE" field contains the date that an adjournment was requested and granted. Based on the new information provided in Mr. McDowell's declaration, however, it is clear this assumption is false. This affects Dr. Palmer's analysis because he bases his calculation of "delay due to an adjournment" on the number of days from the date shown in the "ADJ_DATE" field to the next scheduled hearing date. If the date contained in the ADJ_DATE field is not the date of the actual adjournment, then the calculated delay due to an adjournment will be incorrect.

7. Second, Mr. McDowell's declaration clarifies that hearing dates in immigration cases are not always scheduled chronologically. In the same example discussed above, the Schedule Table shows a hearing scheduled for August 26, 2010 and a second later hearing scheduled for September 2, 2010. Mr. McDowell states at paragraph 7 that "The hearing for September 2, 2010, was created on August 10, 2010." Thus while the September 2 hearing was scheduled to occur *after* the August 26 hearing, it was already scheduled *well before* the August 26 hearing was to occur.

8. Dr. Palmer's analysis is premised on an assumption that hearings are scheduled chronologically. That is, that the example we saw of a previously-

scheduled hearing never occurs. Dr. Palmer assumes that *only* if a hearing is adjourned will any later hearing ever be scheduled.

9. This incorrect assumption results in two types of errors in Dr. Palmer's calculations. First, when hearings are not scheduled chronologically, it makes little logical sense to assume that the specific number of days between the two hearings are in fact a *delay*. In such instances, the events at the prior hearing could not have necessitated the scheduling of the subsequent one—as the subsequent one had already been scheduled. Second, Dr. Palmer classifies this period as *alien-caused* when the adjournment reason for the immediately prior hearing was at the alien's request. However, when hearings are not scheduled chronologically, the second hearing was not *caused* by that prior adjournment, and it is incorrect to use the reason for that adjournment to attribute the party responsible for the "delay."

10. While these incorrect assumptions determined how Dr. Palmer calculated alien-caused delays and therefore affected Dr. Palmer's results, I cannot estimate how substantial of an effect these incorrect assumptions had based on the limited information that the government has produced in this case. To measure the effect of Dr. Palmer's erroneous assumptions, I would as a starting point need to be able to accurately link the details contained in the Actions Table to the specific scheduled hearing to which they relate in the Schedule Table. This in turn requires the "UPDATE _DATE" values from the Schedule Table because, as Mr. McDowell now indicates in paragraph 13 of his

declaration, the dates in this field are needed to "determin[e] which schedule record goes with each action record." However, I only have the contents of the UPDATE_DATE field for the single case shown in Mr. McDowell's latest declaration. The UPDATE_DATE field was not included in any of the ACCESS files released to the Petitioners' counsel or otherwise available to me (or, apparently, to Dr. Palmer). Thus, I do not have the EOIR data required to carry out the analysis needed to determine the magnitude of error introduced by Dr. Palmer's incorrect assumptions.

11. Mr. McDowell's declaration also purports to address the inconsistencies between the Schedule and Actions Table data that I documented in my Rebuttal Expert Report. In his declaration, Mr. McDowell includes a table with information from the Schedule and Actions tables for a single case. In that table, Mr. McDowell provided information from a field—"UPDATE_DATE"—regarding the date on which the Schedule Table was updated for the case in question. Information from this field had not previously been included in any of the ACCESS files released to the Petitioners' counsel or otherwise available to me. Mr. McDowell's relies on the UPDATE_DATE" field information to explain the inconsistencies in the Schedules and Action Tables with respect to this individual case, but because the government has not provided this field for any of the other cases I analyzed, there is no way for me to verify his explanation for the entire dataset.

12. Even though the government has not provided the information necessary to assess the validity of Mr. McDowell's claims, the limited information provided

by Mr. McDowell raises additional questions regarding the reliability of data in the Schedule Table. For example, in the illustrative case discussed by Mr. McDowell, there is an entry with an "ADJ_DATE" for 3/1/2011 with an "UPDATE_DATE" of 3/28/2011. Based upon the information provided by Mr. McDowell, there is no way to determine whether a hearing or adjournment in fact occurred on 3/1. Reprinted below is the record from the Schedule Table from McDowell's declaration for this hearing.

IDNCASE	ADJ_RSN	ADJ_DATE	UPDATE_DATE
6566575	13	3/1/2011	3/28/2011

There are three entries on 3/28/2011 in the Actions Table for this case as shown below (from Exhibit 3 of the November 27, 2012 deposition of Dr. Palmer).

IDNCASE	IDNACTION	DATACTION	STRDESCRIPTION	STRREACTION
6566575	40536459	3/28/2011	Adjournment	Added
6566575	40536669	3/28/2011	Individual Hearing	Scheduled
6566575	40537568	3/28/2011	Actions - Worksheet	Generated

There is no entry in the Actions Table of any kind on 3/1. Indeed, the above three entries are the only entries in the Actions Table during the period following December 7, 2010 until April 19, 2011. Based on this information we cannot tell whether the hearing scheduled for 3/1 took place, and we also cannot be sure when the 3/1 scheduled hearing was adjourned. If we rely on Mr. McDowell's method for matching records from the Actions Table with the Schedule Table, that method indicates that the adjournment was officially recorded on 3/28. Does that mean that the adjournment occurred on 3/28, nearly four-weeks after

the date of the scheduled hearing on 3/1? Or that the hearing on 3/1 was adjourned, but the data reflecting that adjournment was not entered for nearly four weeks after the scheduled hearing? Because Mr. McDowell has stated that the "UPDATE_DATE" field was not designed with the purpose of linking these two tables, see Dkt. 299-1 ,¶5, there is no way to determine the relationship between the entries in Action and Schedule Tables based on the information provided. As such, we simply cannot tell for sure whether the hearing or adjournment in fact occurred on 3/1 based on the information that the government has provided.

13. Mr. McDowell's declaration also purports to explain the inconsistencies between the Schedule Table and the Actions Table in three other individual cases. However, Mr. McDowell did not provide information from the "UPDATE_DATE" for these three cases. As such, it is impossible for me to verify the accuracy of his assertions regarding the relationship of the Schedule and Actions tables in those cases. Respondents have not provided information from the "UPDATE_ DATE" field in the Schedule Table, aside from the single case cited in Mr. McDowell's declaration.[2]

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[2] Indeed, the one example of apparent discrepancies which Mr. McDowell identifies as "really [] not discrepancies at all" *was not counted as a discrepancy* in my analysis. Mr. McDowell observes that the Actions Table had the same number of adjournments entries as the number of scheduled hearings in the Schedule Table, once the Actions Table data is limited to "Added" entries and the "Edited" entries are excluded. However, I already excluded all "Edited" adjournment records from my analysis. *See* Dkt. 281-6, Exh. B at 4 n.2. In addition, the difference between the 9/2/2010

Without the information recorded in the UPDATE_DATE field corresponding to each scheduled hearing, I have no way to verify if in fact this additional information would account for the large number of inconsistencies I found between the "ADJ_DATE" in the Schedule Table and the "Adjournment" date entered in the Actions Table. Only with this additional information can I determine whether this would allow me to (a) "match" each scheduled hearing in the Schedule Table with a specific adjournment in the Actions Table, and (b) verify that each adjournment in the Actions Table "matches" a specific scheduled hearing in the Schedule Table. Because of the significant inconsistencies I documented between the Action and Schedule tables, being able to carry out successful matching in this way is essential to determine whether Dr. Palmer relied on sufficiently reliable data.

14. I did not receive word that Respondents had disclosed updated database information for the studied class members until after I completed the analysis for my Expert Report in this action. I did analyze the updated data for the purposes of my Rebuttal Expert Report. The updated data did not materially affect any of the statistics reported in my Expert Report—that is, result in *lower* values for detainee success or detention length. If anything, the reported statistics on detention time would have generally been

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date of the scheduled hearing and its 8/30/2010 adjournment also was not included in my count of records that did not match since any dates within plus/minus 3 days of one another, as these are, were treated as a "match." *See* Dkt. 281-6, Exh. B at 5.

somewhat higher with the updated data than those I reported in my original Expert Report.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct to the best of my knowledge and belief. Executed this 4th day of Apr., 2013 in Syracuse, New York.

/s/ SUSAN B. LONG
SUSAN B. LONG

Declaration of Benjamin B. McDowell

March 15, 2013

I, BENJAMIN B. McDOWELL, declare as follows:

1. I am a program analyst with the Department of Justice, Executive Office for Immigration Review (EOIR) in Falls Church, Virginia. I have been a program analyst with EOIR since February 1, 2010. I am familiar with, and routinely use and rely on, EOIR's CASE program. CASE is the Informational Resource Management System that provides EOIR with case tracking and management information, office automation, Internet/Intranet, and automated legal research service. CASE allows users to access database information about various aspects of an individual's removal proceedings before the immigration courts.

2. I am familiar with this litigation. In 2010, I was asked by counsel for Respondents to assist in providing certain categories of database information accessed through CASE in response to discovery requests. I created a readable ACCESS database containing the requested information in various tables, along with lookup tables that serve as keys for abbreviations or codes used in the database. ACCESS is a commercially available Microsoft program that allows users to view and create tables from information compiled by the user. The ACCESS database has several tables, including both a Schedule Table and an Actions Table.

3. The purpose of the Schedule Table is to record metadata about hearings that take place in the Immi-

gration Courts. The Schedule Table identifies certain actions in a removal proceeding by an alien number (or IDNCASE number) and a proceeding number (or IDNPROCEEDING number). The Schedule Table identifies the dates of hearings and other actions before an immigration court in a proceeding, including whether a hearing was concluded or rescheduled, or, as the database refers to it, "adjourned." The Schedule Table identifies, for example, when a hearing was adjourned (ADJ_DATE), and the reason indicated by court staff for the adjournment, or "adjournment code" (ADJ_RSN). The database also identifies the type of hearing, or "schedule type," which is typically a master calendar hearing, a reset master calendar hearing, a custody hearing, or a merits or individual hearing (these codes are found under the SCHEDULE_TYPE column of the table.

4. As I more thoroughly explained in my declarations dated July 18, 2012, and December 14, 2012, if the user were to look at an individual's proceeding in the Schedule Table, the user would be able to identify the dates of all of the hearings in that proceeding. The user would also be able to see the reason that each hearing was concluded and, if a future hearing was scheduled, why the case did not conclude at the previous hearing. For example, the user could see that the individual had a hearing scheduled for a particular day. The user could also look down the table and, if there were a subsequent hearing date, the user could determine that the case was continued from the earlier date until the later date. The user could also determine which party requested the continuance and the reason for the request by looking at the adjournment code

associated with the earlier hearing. Thus, the table lists the individual's hearing dates, the reasons for scheduling future hearing dates, and the party or parties requesting the future hearings.

5. The Actions Table stores information concerning actions to a record in CASE. Records from the Schedule Table and the Actions Table cannot be programmatically linked to one another. However, the records in each of these tables can be analyzed to determine how they correspond to one another. A record in the schedule table can be linked to a record in the case table by the IDNCASE, and a record in the actions table can also be linked to a record in the case table by the IDNCASE, but there is no data element in one of these tables that can be linked to a key in the other. This means that the most direct correlation that can be programmatically made between these two tables is that they each belong to the same case. Each hearing in the schedule table will have a corresponding entry in the actions table.

6. I have reviewed the certified transcript and exhibits from the deposition of Dr. Chester Palmer taken by Petitioners on November 27, 2012. At Dr. Palmer's deposition, Petitioners asked Dr. Palmer about a set of documents entered as exhibits 3-7 to Dr. Palmer's November 27, 2012 deposition. Counsel represented that each of exhibits contained two set of information for a particular IDNCase: (1) the complete list of all of the information from the Schedule Table; and (2) the complete list of all of the information from the Actions Table. In the paragraphs below I briefly describe the information in the exhibits and the relationship between the information in the Schedule Table

and the Actions Table in each of the exhibits. The explanations are based on my review of the exhibits and my experience working with the CASE system.

7. Exhibit 3 to Dr. Palmer's Deposition (IDNCase 6566575), which is attached as Exhibit R to the March 15, 2013 declaration of Theodore W. Atkinson:

There are seven adjournments for this case. Three of these adjournments are alien caused delays, and for this case one of those hearings was adjourned with the adjournment code of 12 and two were adjourned with the adjournment code of 02. These three adjournments aggregately delayed the case for 96 days. These adjournments did occur during the time that this alien was in custody, and in fact all were during the first 180 days of custody. Each of the adjournments that were recorded has a corresponding action recorded. The hearing for September 2, 2010, was created on August 10, 2010, and was last updated on September 1, 2010, and there is an action dated September 1, 2010, with the IDNACTION of 34869451 that corresponds with this adjournment. This hearing had been entered previously on August 30, 2010, and there is an action dated August 30, 2010, with the IDNACTION of 34816230 that corresponds with the original entry of this adjournment. The hearing for March 1, 2011, was created on December 7, 2010, and there is an action dated March 28, 2011, with the IDNACTION of 40536459 that corresponds with this adjournment.

8. Exhibit 4 to Dr. Palmer's Deposition (IDNCase 6426393), which is attached as Exhibit R to the March 15, 2013 declaration of Theodore W. Atkinson:

There are six adjournments for this case. Four of these adjournments are alien caused delays, and for this case two of those hearings were adjourned with the adjournment code of 12, one was adjourned with the adjournment code of 06, and one was adjourned with the adjournment code of 02. These four adjournments aggregately delayed the case for 121 days. These adjournments did occur during the time that this alien was in custody, and in fact all were during the first 180 days of custody. Each of the adjournments that were recorded has a corresponding action recorded. There were two hearings recorded for this case on March 2, 2010. One of those hearings was an initial master hearing, and the other hearing was a custody hearing.

9. Exhibit 5 to Dr. Palmer's Deposition (IDNCase 6475284), which is attached as Exhibit R to the March 15, 2013 declaration of Theodore W. Atkinson:

There are six adjournments for this case. One of these adjournments is an alien caused delay, and for this case that hearing was adjourned with the adjournment code of 12. This adjournment delayed the case for 7 days. This adjournment occurred during the first 180 days of custody. Each of the adjournments that were recorded has a corresponding action recorded. The hearing for April 20, 2010, was created on April 12, 2010, and there is an action dated April 19, 2010, with the IDNACTION of 31436065 that corresponds with this adjournment. The hearing for June 24, 2010, was created on April 27, 2010, and there is an action dated June 28, 2010, with the IDNACTION of 33320049 that corresponds with this adjournment. This adjournment for this hearing had been entered

previously on June 25, 2010, and there is an action with the IDNACTION of 33289209 that corresponds with the entry of this adjournment. The hearing for November 5, 2010, was created on October 1, 2010, and there is an action dated November 8, 2010, with the IDNACTION of 36801581 that corresponds with this adjournment. An application for asylum was received by the courts on April 27, 2010, and was subsequently granted on February 9, 2011.

10. Exhibit 6 to Dr. Palmer's Deposition (IDNCase 6497927), which is attached as Exhibit R to the March 15, 2013 declaration of Theodore W. Atkinson:

There are sixteen adjournments for this case. Three of these adjournments are alien caused delays, and for this case one of those hearings was adjourned with the adjournment code of 05, one was adjourned with the adjournment code of 12, and one was adjourned with the adjournment code of 36. These three adjournments aggregately delayed the case for 245 days. Forty-nine days worth of the delays occurred during the time that this alien was in custody, and these were during the first 180 days of custody. Each of the adjournments that were recorded has a corresponding action recorded. The hearing on August 5, 2010, is an alien caused delay that was created on May 25, 2010, and there is an action dated July 30, 2010, with the IDNACTION of 34058631 that corresponds with this adjournment. The hearing on September 23, 2010, was created on July 30, 2010, and there is an action dated August 5, 2010, with the IDNACTION of 34217272 that corresponds with this adjournment. The hearing for June 5, 2012 was created on November 22, 2011, and there is an action dated

April 26, 2012, with the IDNACTION of 51645765 that corresponds with this adjournment. The hearing for July 3, 2012, was created on April 26, 2012, and there is an action dated July 3, 2012, with the IDNACTION of 53507407 that corresponds with this adjournment. The hearing for January 10, 2011, was created on October 5, 2010, and there is an action dated December 7, 2010, with the IDNACTION of 37540781 that corresponds with this adjournment. The hearing for March 18, 2011, was created on March 14, 2011, and there is an action dated March 21, 2011, with the IDNACTION of 40349627 that corresponds with this adjournment. The hearing for November 22, 2011, was created on September 20, 2011, and there are two actions dated November 22, 2011, with the IDNACTIONs of 47348501 and 47353577 that correspond with this adjournment to add and then to edit this adjournment respectively.

11. Exhibit 7 to Dr. Palmer's Deposition (IDNCase 6292159) which is attached as Exhibit R to the March 15, 2013 declaration of Theodore W. Atkinson:

There are seven adjournments for this case. Three of these adjournments are alien caused delays, and for this case two of those hearings were adjourned with the adjournment code of 12 and one was adjourned with the adjournment code of 06. These three adjournments aggregately delayed the case for 96 days. All of the delays occurred during the time that this alien was in custody, and these were all during the first 180 days of custody. Each of the adjournments that were recorded has a corresponding action recorded. The hearing for December 23, 2009, was created on October 15, 2009, and there are two

actions, both dated December 1, 2009, with the IDNACTION of 24681911 and 24682306 that correspond with this adjournment for adding and editing this adjournment respectively.

12. It would be improper to determine whether information in the Actions Table corresponds with information in the Schedule Table based on the number of records in the Actions Table as compared to the number of records in the Schedule Table. Although there is no mechanism for directly linking scheduled hearings to the actions that were recorded for them in the actions table, it can be determined that each hearing in the Schedule Table has a corresponding entry in the action table for the record being added, and in the instance where the hearing record was subsequently edited, that hearing will have an additional entry in the Action Table for the editing of the record.

13. Below I offer an example of how what may be appear to be discrepancies between the Schedule Table and the Actions Table really are not discrepancies at all. The following is the information from the Schedule Table and the adjournment information in the Actions Table for IDNCase 6566575:

Schedule Table				Action Table			
IDNCASE	ADJ_RSN	ADJ_DATE	UPDATE_DATE	DATACTION	STRDESCRIPTION	STRREACTION	IDNACTION
6566575	8A	8.26.2010	8.26.2010	8.26.2010	Adjournment	Added	34741637
6566575	12	9.2.2010	9.1.2010	8.30.2010	Adjournment	Added	34816230
				9.1.2010	Adjournment	Edited	34869451
6566575	02	10.7.2010	10.7.2010	10.7.2010	Adjournment	Added	36016689
6566575	02	11.24.2010	11.24.2010	11.24.2010	Adjournment	Added	37240530
6566575	17	12.7.2010	12.7.2010	12.7.2010	Adjournment	Added	37522217
6566575	13	3.1.2011	3.28.2011	3.28.2011	Adjournment	Added	40536459
6566575	8A	4.19.2011	4.19.2011	4.19.2011	Adjournment	Added	41233335

For case 6566575, there are seven records in the schedule table for hearings, and there are eight records in the action table with the STRDESCRIPTION value of "Adjournment," but seven with the STRREACTION value of "Added." The method for deter-

mining which schedule record goes with each action record is to examine the UPDATE_DATE value, which is the date the record was last updated, in the schedule table and compare it to the DATACTION value, which is the date on which the action was added, in the action table. For the 8/26/2010 adjournment for this case, both of these values are on 8/26/2010. The exception to this occurs when a schedule record has been edited subsequent to its being added. In case 6566575, there are no action records with a STRREACTION value of "Added" that match the adjournment of 9/2/2010 with the UPDATE_DATE value of 9/1/2010, but the action record for this case with a STRREACTION value of "Edited" does match this date. The action record for this hearing being "Added" does have a DATACTION value of a prior date, 8/30/2010, and the IDNACTION for this action (34816230) is a number that came up sequentially before this record was "Edited" (34869451).

14. A true and correct copy of my declaration dated July 18, 2012, is attached as Exhibit A to this declaration.

15. A true and correct copy of my declaration dated December 14, 2012, is attached as Exhibit B to this declaration.

I declare under penalty of perjury that the foregoing is true and correct.

Date: Mar. 15, 2013

/s/ BENJAMIN B. MCDOWELL
BENJAMIN B. MCDOWELL

Exhibit A: Declaration of Benjamin McDowell

July 18, 2012

I, BENJAMIN B. McDOWELL, declare as follows:

1. I am a program analyst with the Department of Justice, Executive Office for Immigration Review (EOIR) in Falls Church, Virginia. I have been a program analyst with EOIR since February 1, 2010. I am familiar with, and routinely use and rely on, EOIR's CASE program, which allows users to access database information about various aspects of an individual's removal proceedings before the immigration courts.

2. I am familiar with this litigation. In 2010 I was asked by counsel for Respondents to assist in providing certain categories of database information accessed through CASE in response to discovery requests. I created a readable ACCESS database containing the requested information in various tables, along with lookup tables that serve as keys for abbreviations or codes used in the database. ACCESS is a commercially available Microsoft program that allows users to view and create tables from information compiled by the user. I have updated this database on several occasions, and provided it to EOIR counsel for production to attorneys for Petitioners in this case. The most recent update was conducted in or around late April 2012.

3. I have reviewed portions of the ACCESS database for the purpose of providing counsel for EOIR with representative samples of removal proceedings in which the database information indicates that a

hearing was rescheduled—or, as CASE refers to it "adjourned"—for certain reasons indicated by immigration court staff in the database.

4. The information provided below was determined by examining within the ACCESS database the following:

(1) the Schedule Table Data table, which identifies certain actions in a removal proceeding, identifying the proceeding by an alien number (or IDNCASE number) and a proceeding number (or IDNPROCEEDING number). The Schedule Table identifies the dates of hearings and other actions before an immigration court in a proceeding, including whether a hearing was concluded or rescheduled, or, as the database refers to it, "adjourned." The Schedule Table identifies, for example, when a hearing was adjourned (ADJ_DATE), and the reason indicated by court staff for the adjournment, or "adjournment code" (ADJ_RSN). The database also identifies the type of hearing, or "schedule type," which is typically a master calendar hearing, a reset master calendar hearing, a custody hearing, or a merits or individual hearing (these codes are found under the SCHEDULE_TYPE column of the table.

(2) the Lookup Adjournment Reason table, which is a key that provides a user with the definition or meaning of an adjournment code (ADJ_RSN);

(3) the Lookup Schedule Type table, which is a key that provides a user with the definition or meaning of a hearing type (SCHEDULE_TYPE); and

(4) the Case Data Table, which identifies by IDNCASE number the A number of the alien, the alien's

name, and other personal identifying information about the alien.

5. So, for example, if one were to look at an individual's proceeding in the Schedule Table and see that there was an action (or ADJ_Date) on 3/3/2012 with an adjournment code (ADJ_RSN) "02," one would then look to the Lookup Adjournment Reason and see that "02" means "PREPARATION—ALIEN/ATTORNEY/REPRESENTATIVE." One would also see from the Schedule Table the type of hearing that was conducted on that date (SCHEDULE_TYPE). If that column stated "MM," one would then turn to the Lookup Schedule Type table and see that "MM" means "Initial Master." In plain language, what this information would tell the person looking at these tables is that on March 3, 2012 there was an initial master calendar hearing which ended, according to the court staff inputting the data, to allow an alien or the alien's attorney or representative to prepare. However, the tables would not indicate anything beyond that code for additional details about the adjournment reason. One could then look down the table and if there was a subsequent hearing date, one could determine that the case was continued from March 3, 2012 to the next date. One could then turn to the Case Data table, and lookup the IDNCASE number to find the alien's name and A number. Using this process, one could determine the following.

4. Huitz-Menchu, Oscar (A number 091-414-311)

The ACCESS database contains, among other things, the following information:

Case Table Data

IDNCASE	ALIEN_NBR	ALIEN_NAME
6145280	091414311	HUITZ-MENCHU, OSCAR

Schedule Table Data

IDNCASE	IDNPROCEEDING	ADJ_DATE	ADJ_RSN	SCHEDULE_TYPE
6145280	4729351	1/21/2009	8A	CY
6145280	4729351	2/24/2009	01	MM
6145280	4729351	4/9/2009	01	MR
6145280	4729351	5/6/2009	06	MR
6145280	4729351	7/6/2009	17	MR
6145280	4729351	7/29/2009	35	II
6145280	4729351	8/21/2009	8A	II
6145280	4729351	9/1/2009	25	II

The ACCESS database shows that IDNCASE number refers to an individual identified as Oscar Huitz-Menchu (Case Table Data). Looking at that IDNCASE number in the ACCESS database, there is a proceeding identified by the IDNPROCEEDING number 4729351. The tables above show the information for the columns shown for that proceeding number in the ACCESS database. The ADJ_DATE column identifies all the dates associated with an adjournment. The ADJ_RSN column lists the identified adjournment code (which is defined on the Lookup Adjournment Reason table). The SCHEDULE_TYPE column identifies the type of action or hearing associated with the identified date for that proceeding number. According to the ACCESS database:

(a) This alien had a custody ("CY" in the Lookup Schedule Type table) action on January 21, 2009. The reason for adjournment is identified as "IJ Completion prior to hearing" ("8A" on the Lookup Adjournment Reason table).

(b) This alien had an initial master calendar hearing ("MM") on February 24, 2009. The reason for adjournment is identified as "ALIEN TO SEEK REPRESENTATION" ("01").

(c) This alien had a rescheduled master calendar hearing ("MR") on April 9, 2009. The reason for adjournment is again identified as "ALIEN TO SEEK REPRESENTATION" ("01").

(d) This alien had a rescheduled master calendar hearing ("MR") on May 6, 2009. The reason for adjournment is identified as "ALIEN TO FILE OTHER APPLICATION" ("06").

(e) This alien had a rescheduled master calendar hearing ("MR") on July 6, 2009. The reason for adjournment is identified as "MC TO IC--MERITS HEARING" ("17").

(f) This alien had an individual hearing ("II") on July 29, 2009. The reason for adjournment is identified as "UNPLANNED IJ LEAVE - DETAIL/ OTHER ASSIGNMENT" ("35").

(g) This alien had an individual hearing ("II") action on August 21, 2009. The reason for adjournment is identified as "IJ Completion prior to hearing" ("8A").

(h) This alien had an individual hearing ("II") action on September 1, 2009. The reason for adjournment is identified as "TO ALLOW FOR SCHEDULING OF PRIORITY CASE" ("25").

5. Godina-Pallares, Israel (A number 095-776-691)

The ACCESS database contains, among other things, the following information:

Case Table Data

IDNCASE	ALIEN_NBR	ALIEN_NAME
6193640	095776691	GODINA-PALLARES, ISRAEL

Schedule Table Data

IDNCASE	IDNPROCEEDING	ADJ_DATE	ADJ_RSN	SCHEDULE_TYPE
6193640	4790005	4/23/2009	02	MM
6193640	4790005	6/16/2009	02	MR
6193640	4790005	7/22/2009	01	MR
6193640	4790005	9/28/2009	01	MR
6193640	4790005	11/25/2009	06	MR
6193640	4790005	2/8/2010	06	MR
6193640	4790005	3/31/2010	06	MR
6193640	4790005	4/26/2010	8A	MR

The ACCESS database shows that IDNCASE number refers to an individual identified as Israel Godina-Pallares (Case Table Data). Looking at that IDNCASE number in the ACCESS database, there is a proceeding identified by the IDNPROCEEDING number 4790005. The tables above show the information for the columns shown for that proceeding number in the ACCESS database. The ADJ_DATE column identifies all the dates associated with an adjournment. The ADJ_RSN column lists the identified adjournment code (which is defined on the Lookup

Adjournment Reason table). The SCHEDULE_TYPE column identifies the type of action or hearing associated with the identified date for that proceeding number. According to the ACCESS database:

(a) This alien had an initial master calendar hearing ("MM") on April 23, 2009. The reason for adjournment is identified as "PREPARATION—ALIEN/ATTORNEY/REPRESENTATIVE" ("02"). I note that there is a separate code in the Lookup Adjournment Reason table for "PREPARATION—DHS," which is code "03."

(b) This alien had a rescheduled master calendar hearing ("MR") on June 16, 2009. The reason for adjournment is identified as "PREPARATION—ALIEN/ATTORNEY /REPRESENTATIVE" ("02").

(c) This alien had a rescheduled master calendar hearing ("MR") on July 22, 2009. The reason for adjournment is identified as "ALIEN TO SEEK REPRESENTATION" ("01").

(d) This alien had a rescheduled master calendar hearing ("MR") on September 28, 2009. The reason for adjournment is again identified as "ALIEN TO SEEK REPRESENTATION" ("01").

(e) This alien had a rescheduled master calendar hearing ("MR") on November 25, 2009. The reason for adjournment is identified as "ALIEN TO FILE OTHER APPLICATION" ("06").

(f) This alien had a rescheduled master calendar hearing ("MR") on February 8, 2010. The reason for adjournment is again identified as "ALIEN TO FILE OTHER APPLICATION" ("06").

(g) This alien had a rescheduled master calendar hearing ("MR") on March 31, 2010. The reason for adjournment is again identified as "ALIEN TO FILE OTHER APPLICATION" ("06").

(h) This alien had a rescheduled master calendar hearing ("MR") action on April 26, 2010. The reason for adjournment is identified as "IJ Completion prior to hearing" ("8A"). I declare under penalty of perjury that the foregoing is true and correct.

Date: July 18, 2012

/s/ BENJAMIN B. McDOWELL
BENJAMIN B. MCDOWELL

Exhibit B: Declaration of Benjamin McDowell

December 14, 2012

I, BENJAMIN B. McDOWELL, declare as follows:

1. I am a program analyst with the Department of Justice, Executive Office for Immigration Review (EOIR) in Falls Church, Virginia. I have been a program analyst with EOIR since February 1, 2010. I am familiar with, and routinely use and rely on, EOIR's CASE program, which allows users to access database information about various aspects of an individual's removal proceedings before the immigration courts. EOIR's CASE program displays data stored in the EOIR database, known as EOIRDB, which is a relational database running on Microsoft's SQL Server.

2. I am familiar with this litigation. In 2010 I was asked by counsel for Respondents to assist in providing certain categories of database information accessed through CASE in response to discovery requests. I created a readable ACCESS database containing the requested information in various tables, along with lookup tables that serve as keys for abbreviations or codes used in the database. ACCESS is a commercially available Microsoft program that allows users to view and create tables from information compiled by the user. I have updated this database on several occasions, and provided it to EOIR counsel for production to attorneys for Petitioners in this case. The most recent update was conducted in or around October 2012.

3. I reviewed portions of the ACCESS database for the purpose of creating the excel spreadsheet entitled "AC Delays" for use by Dr. Chester Palmer. The information contained in the AC Delays column's labeled "IDNCASE," IDNPROCEEDING," "ADJ_ DATE," and "ADJ_RSN" was extracted from the ACCESS database's Schedule Table Data table. The information contained in the AC Delays columns labeled "alien_ name" and "alien_nbr" was taken from the ACCESS database's Case Data Table, which identifies by IDNCASE number the A number of the alien, the alien's name, and other personal identifying information about the alien. The information contained in the AC Delays column labeled "Alien Caused" was taken from the ACCESS database's data field "REGD _BY" in the Lookup Adjournment Reason table, which is a code that represents the party responsible for the hearing adjournment. I understand that this code was also provided to Dr. Palmer and Petitioners' counsel in an Excel document entitled "dbo_tblAdjournmentcodes."

4. The Schedule Table reflects all hearing related information. The Schedule Table identifies the proceeding by a case number (or IDNCASE number) and a proceeding number (or IDNPROCEEDING number). It identifies the dates of hearings before an immigration court in a proceeding, including whether a hearing was concluded or rescheduled, or, as the database refers to it, "adjourned." The Schedule Table identifies, for example, when a hearing was adjourned (ADJ_DATE), and the reason indicated by court staff for the adjournment, or "adjournment code" (ADJ_ RSN). The database also identifies the type of hear-

ing, or "schedule type," which is typically a master calendar hearing, a reset master calendar hearing, a custody hearing, or a merits or individual hearing (these codes are found under the SCHEDULE_TYPE column of the table).

5. As I more thoroughly explained in my declaration dated July 18, 2012, if the user were to look at an individual's proceeding in the Schedule Table, the user would be able to identify the dates of all of the hearings in that proceeding. The user would also be able to see the reason that each hearing was concluded and, if a future hearing was scheduled, why the case did not conclude at the previous hearing. For example, the user could see that the individual had a hearing scheduled for a particular day. The user could also look down the table and, if there were a subsequent hearing date, the user could determine that the case was continued from the earlier date until the later date. The user could also determine which party requested the continuance and the reason for the request by looking at the adjournment code associated with the earlier hearing. Thus, the table lists the individual's hearing dates, the reasons for scheduling future hearing dates, and the party or parties requesting the future hearings.

6. The most reliable way to calculate the amount of time a proceeding was delayed due to a particular continuance request using information in the ACCESS database is by using the information in the Schedule Table. The operational purpose of the Schedule Table is such that the information may be used to calculate the number of days between hearing dates where a hearing was adjourned for a specific purpose. The

most appropriate way to calculate the length of delays in the proceeding attributable to a particular reason for adjournment would be to calculate the number of days between the adjourned hearing and the next hearing as those dates appear in the Schedule Table. It would not be appropriate to calculate delays based on dates associated with data entry or data correction contained in the Actions Table.

7. It would not cause me to doubt the reliability of the information in the Scheduling Table if the Action Table did not contain parallel entries. The operational purposes of the Scheduling Table and the Action Table are distinct. The Scheduling Table is a subordinate table to the Proceeding table that captures all hearing-related metadata. The Action Table is an auditing table that holds information about actions added to a record in CASE. The Actions Table is not set up in a way that allows the user to link particular entries in the Actions Table to particular changes in the Schedule Table because there is no key that relates entries in the Actions Table and schedule information in the Schedule Table. As a result of their different operational purposes, I would not expect the tables to contain information that could be easily matched up. For the same reasons, if I wanted to check the reliability of the data contained in the Schedule Tables, I would not compare it to information in the Actions Table.

I declare under penalty of perjury that the foregoing is true and correct.

Date: Dec. 14, 2012

/s/ BENJAMIN B. MCDOWELL
BENJAMIN B. MCDOWELL

Declaration of Byron Merida

1. I make this declaration based on my own personal knowledge and if called to testify I could and would do so competently as follows:

2. My name is Byron Merida. I am originally from Guatemala. I came to the United States in 1986 on a tourist visa and have lived here since that time. My entire immediate family lives in the United States including my mother Amparo (age 72) and my father Rafael (age 72), and my sisters Helga (age 52), and Aida (age 51) my brothers Rafael (age 53) and Oscar (age 40), and my brother in law Audenago (age 45), and my sister in law Rosa (age 35), and my nieces Helga-Livier (age 20), Maura (age 19), Jasmine (age 17) and Rosi (age 3) and Vini (age 1). Most of them are United States citizens and the rest are legal permanent residents. My ex-wife Gladis Espino is a United States citizen, but she divorced me after I had been in immigration detention for approximately 2 years.

3. During my time in the United States, I have built several businesses in the financial and computer industries. Among the business in which I was involved, I founded Mortgage Financial Group, Inc., in 2004. The company provided mortgage and real estate services, and employed approximately 10-15 people.

4. At the end of 2008, due to the economic downturn and financial pressure I was under, I made some bad decisions that I regret. In March 3rd 2009 I was convicted of Second Degree commercial burglary and sentenced to 365 days in jail. It is my only criminal conviction. In April 2009 I was about to be release

from county jail, when I got notify that I had an Immigration hold and in June 29, 2009 I was transferred to immigration custody and placed in removal proceedings.

5. In the beginning of my case, the immigration judge told me that my criminal conviction was an "aggravated felony" and that, as a result, I could not adjust my status or be released on bond. The immigration judge ordered me removed in May 11, 2011.

6. I appealed the immigration judge's ruling to the BIA, and the BIA affirmed the decision in September 30th 2011. I appealed to the Ninth Circuit in October 17th 2011. In October 2012, the Ninth Circuit granted my petition for review and remanded my case to the BIA. I filed a brief with the BIA in November 2012. I just learned that I have an immigration court hearing on March 13th 2013.

7. After I appealed to the Ninth Circuit, I received a notice of custody determination from ICE that said that they had decided not to release me.

8. From my experience working in the law library and reading legal materials, I knew I could request a *Casas* bond hearing after I appealed to the Ninth Circuit. However, I thought that the immigration judge would likely deny me release or set a very high bond because of what the judge had said to me about the seriousness of my criminal conviction. My family is currently under a lot of financial stress because my sister-in-law is very ill with multiple sclerosis and they have to spend the little money they have taking care of her. Even if the judge set a high bond, I was worried

that my family would have to choose between my bond or my sister-in-law's medical care.

9. In October 2012, I received notice that I would get a bond hearing due to the *Rodriguez* case. At that point I had been detained over three years in immigration detention. I decided I would try to ask the judge to release me on a low bond because I could not stand to be in detention any longer, but I did not want to give up my immigration case and the chance to stay here with my family.

10. In approximately late October 2012, I had my *Rodriguez* bond hearing and the judge ordered me released on a $2,500 bond. I was released several weeks later in November 2012. I spent a total of three years and 4 months in detention. I am now living with my sister. I am very thankful to be able to be able to continue fighting my case outside of detention.

11. During my time in detention, I was detained in Mira Loma for approximately a little more than 2 years and detained in Adelanto for approximately a little more than one year.

12. At Mira Loma, I would frequently visit the law library to work on my case. Due to the limitation and access of legal material I purchase my own legal books and then I gradually learned a lot about the immigration process. However, most of the detainees I met in Mira Loma understood very little about their cases and the immigration process. Many did not have attorneys, speak or read English, or understand the steps for applying for relief, bond or for appeals. During my time in Mira Loma, I helped many people

research their cases because I had learned a lot of about the immigration process, the legal materials available at Mira Loma, and because I could read and write English fluently. In total, over the course of my time in at Mira Loma, I would estimate that I informally assisted more than 500 people with their immigration cases.

13. At Adelanto, I also informally assisted many detainees with their cases. I worked at two law libraries during my time in Adelanto. For the approximately first six or seven months I was detained, I worked at the law library in Building 1. After that, I was moved to a different housing unit, and worked at the law library in Building 2. I worked at the law library in Building 2 for approximately seven to eight months. Because of my work in the law library, I had frequent contact with detainees who were attempting to use the library materials.

14. The law library in Building 1 was open from 8 AM to 4 PM, Monday through Friday. The law library consisted of eight computer terminals. There were no paper books or materials available in the law library. Each of the computer terminals had a LEXIS program that contained some legal materials.

15. Approximately 300 detainees had access to the law library in Building 1. If a detainee wanted to use the law library, he had to sign a schedule that had 1-hour periods. Each hour, the law librarian would pick up the people assigned for the hour and take them to the law library. Because it usually took time to return the detainees to their housing units and pick up the new detainees, detainees would only be able to use

the computer terminals on average for 25-30 minutes of the hour period. Each detainee was permitted only one hour per day at the law library.

16. The law library in Building 2 was open from 8 AM to 4 PM, Monday through Friday. The law library consisted of six computer terminals. There were some paper books available in Building 2, but they were mostly fiction novels. I do not believe there were any paper legal materials available.

17. Approximately 300 detainees had access to the law library in Building 2. Access for the law library in Building 2 was different than in Building 1. Detainees were permitted to use the law library for 2 hours each day. In addition, because the law library adjoined the housing units, the law librarian did not need to escort detainees to and from the library.

18. The only way to access legal materials at the computer terminals in the law library was through LEXIS. During my time in Adelanto, there were often problems accessing the legal materials on the LEXIS program. On three occasions, the facility did not renew the subscription and login information for the LEXIS program, and the program was completely inaccessible until the subscription was renewed. I would notify the person in charge of the law library when the program did not work, but it would usually take a significant amount of time to fix it. The first two times this occurred, we had no access to the LEXIS program for approximately two weeks. The last time this occurred, in approximately September-October 2012, we had no access to the LEXIS program for between one to two months. During these times,

we had no access to any legal materials in the law libraries, apart from our own files and notes.

19. One of the legal materials available on the LEXIS program is the Immigration Court Practice Manual. The document contains information about the immigration court process, and has sample forms. On occasion, I would review the Manual when helping people to find legal materials relevant to their cases. In my experience, detainees found the Manual difficult to understand because it contained a lot of legal terminology. For that reason, I would usually rely on notes and forms I had previously collected, rather than the Manual, when helping people to find forms and legal materials relevant to their cases.

20. During my time in detention, I regularly met detainees who had appealed their cases to the Ninth Circuit. Many of the detainees did not realize that they could request a *Casas* hearing and ask to be released on bond. I would estimate that I spoke to dozens of people who did not know they could request a *Casas* hearing. Some reported not receiving any notice of a *Casas* custody determination from ICE. Some others reported receiving a notice, but did not understand that they could request a *Casas* hearing in immigration court.

21. Of the people who did not realize they could request a *Casas* hearing, many already had been detained for a significant period of time after they had filed their Ninth Circuit appeal. Several had been detained for at least 3-4 months, and a couple had been detained for more than a year after they filed their petitions for review and stays of removal. After I told

them that they could request a *Casas* hearing, I explained how they could file a motion for a *Casas* hearing if they wanted to request one. I also explained how they could prepare for the bond hearing, including by gathering documents and identifying witnesses. Several of the people I assisted were granted a *Casas* bond and released.

22. I feel fortunate that I could assist the other detainees as a law librarian because of my fluency in English, my education, and my ability to read and understand the legal materials. Most of the other detainees I met struggled to understand and represent themselves in immigration court. I would estimate that I had contact with many hundreds of individuals during my time in immigration detention. Of the individuals I encountered, I would estimate that most were not proficient in English, and many were not literate in any language.

23. In my experience, detainees in Adelanto received notices from the immigration court through the mail, and not by hand delivery.

I declare under penalty of perjury of the laws of the State of California and the United States that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 7th day of Feb., 2013 in the city of Van Nuys, California.

/s/ BYRON MERIDA
BYRON MERIDA

Declaration of Caitlin Patler

I, Dr. Caitlin Patler, hereby declare:

1. I am a University of California President's Postdoctoral Fellow in the UC Irvine Department of Criminology, Law and Society. I received my Ph.D. in Sociology from UCLA in 2014, where I was a National Science Foundation Graduate Research Fellow, a Ford Foundation Diversity Fellow, and a UCLA Center for the Study of Women Paula Stone Legal Research Fellow. I received my M.A. in Sociology at UCLA in 2009, and my B.A. with College Honors, Magna Cum Laude, in Sociology and Chicana/o Studies from UCLA in 2003.

2. I have extensive training, expertise, and experience in quantitative analysis and methodology, having completed courses in survey research methodology, statistics, and advanced quantitative data analysis.

3. Petitioners' counsel gave me a true and correct set of reports and spreadsheets that the Government filed as part of its compliance reporting in *Rodriguez v. Robbins*. The status reports and supporting spreadsheets were filed on November 4, 2013, January 28, 2014, Februrary 7, 2014, April 4, 2014, April 28, 2014, May 15, 2014, July 28, 2014, and September 15, 2014. These reports are reflected on the district court docket as Dkt. 377, 405, 408, 411, 412, 417, 420, 422 and 429. Attached here to as Exhibit A are true and correct copies of these status reports and spreadsheets.

4. I have summarized the data contained in the spreadsheets accompanying the first three status reports that were filed on on November 4, 2013

("13-11-04 Spreadsheet 01—Accompanying Status Report 01"), January 28, 2014 ("14-01-28 Spreadsheet 02—Accompanying Status Report 02"), Feburary 7, 2014 ("14-02-07 Spreadsheet 02—SUPPLEMENTAL —Accompanying Status Report 02"), and April 28, 2014 ("14-04-28 Spreadsheet 03—Accompanying Status Report 03" and "14-04-28 ACLU Identified Missing SS Entries 4_28_2013"). I conducted the summaries without performing any techniques that require advanced statistical training or understanding, using just simple mathematical formulas (such as addition or averaging). Attached hereto as Exhibit B is a true and correct copy of tables containing the summarized data.

5. The government status reports include data on approximately 2,068 individuals who were scheduled for a bond hearing under the preliminary and permanent injunctions, and provides data on the outcome of 1,680 bond hearings where bond was either granted (in some amount) or denied.

6. The government's status reports also include data on the outcomes of approximately 270 bond appeals filed by immigration detainees. Exhibit B groups these 270 appeals into three groups: (a) instances where an appeal was remanded for further proceedings; (b) instances where an appeal was labeled as "dismissed," "affirm decision," "summary affirmance," "sustain," or "dismiss appeal/affirm IJ decision";[1] and (c) instances where an appeal was labeled as "withdrawn/appeal withdrawn," "lacks jurisdiction," "moot bond," "pending" or "other."

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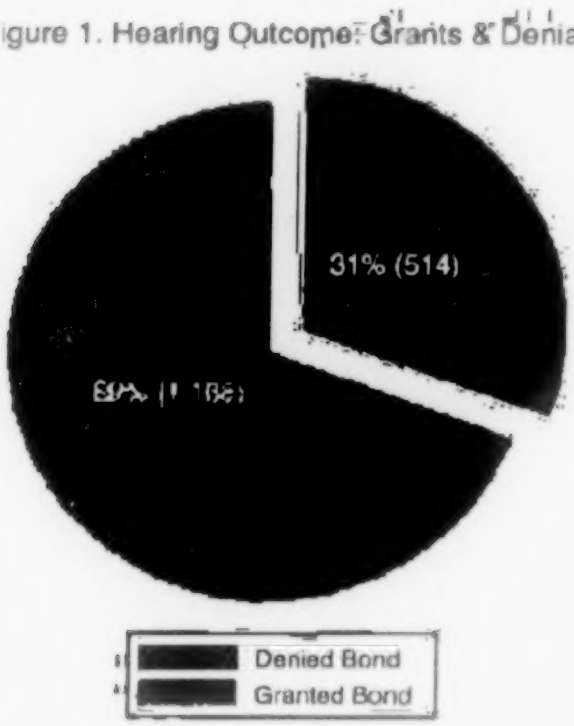
[1] "IJ" is used as an abbreviation for Immigration Judge.

I declare under penalty of perjury of the laws of the State of California and the United States that the foregoing is true and correct to the best of my knowledge and belief. Executed this 22st day of Sept., 2014, in Los Angeles, California.

/s/ CAITLIN PATLER
CAITLIN PATLER

Exhibit B

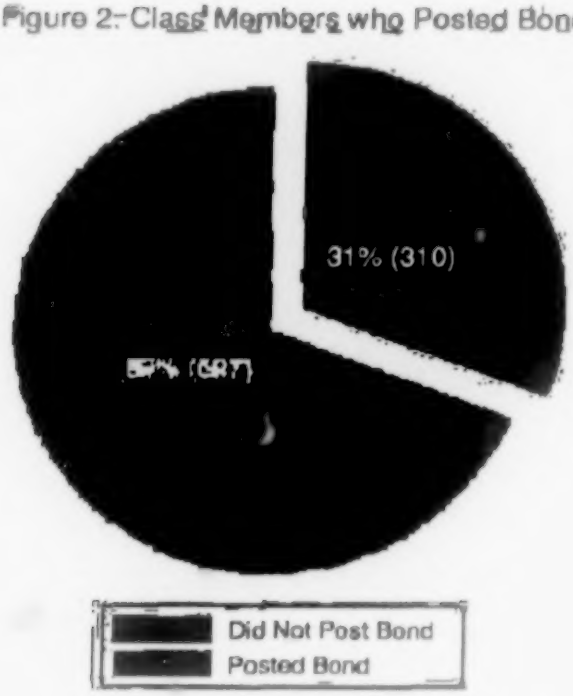
FIGURE 1. Outcome of Bond Hearings[1,2]



[1] All the data reported herein was drawn from three status reports filed by the government in *Rodriguez*. The status reports include data on bond hearings conducted from October 2012 to April 2014.

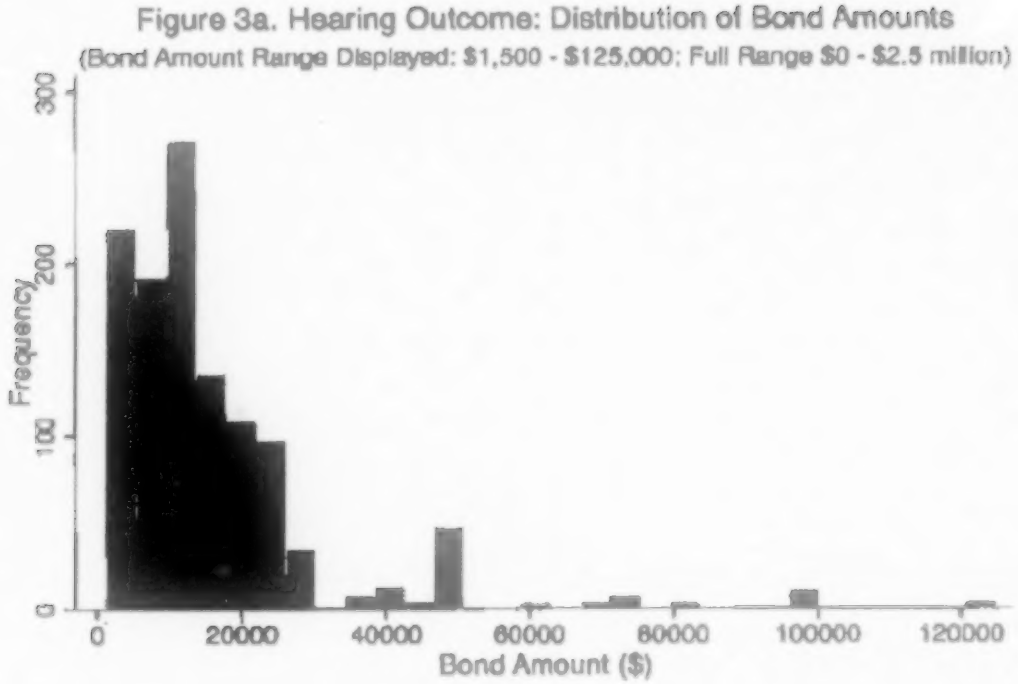
[2] Figure 1 summarized data on bond hearing in which the class member was ordered released on bond (in some amount) or other conditions of release, or denied release on bond. The chart "continued/rescheduled" or "no action—released."

FIGURE 2, Class Members Who Posted Bond[3]



[3] The government status reports do not report posting data for all class members ordered released on bond. Accordingly, the total number of class members in this chart is less than the number reported granted bond in Figure 1.

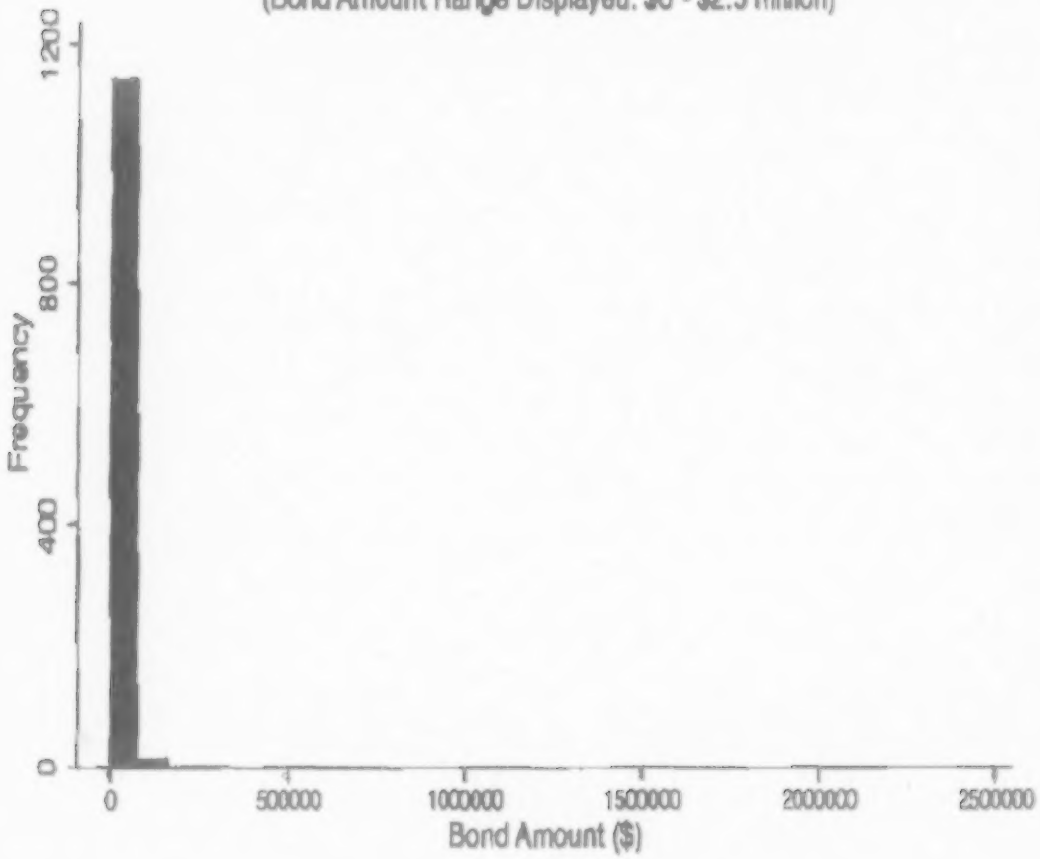
FIGURES 3a and 3b. Bond Amounts[4]



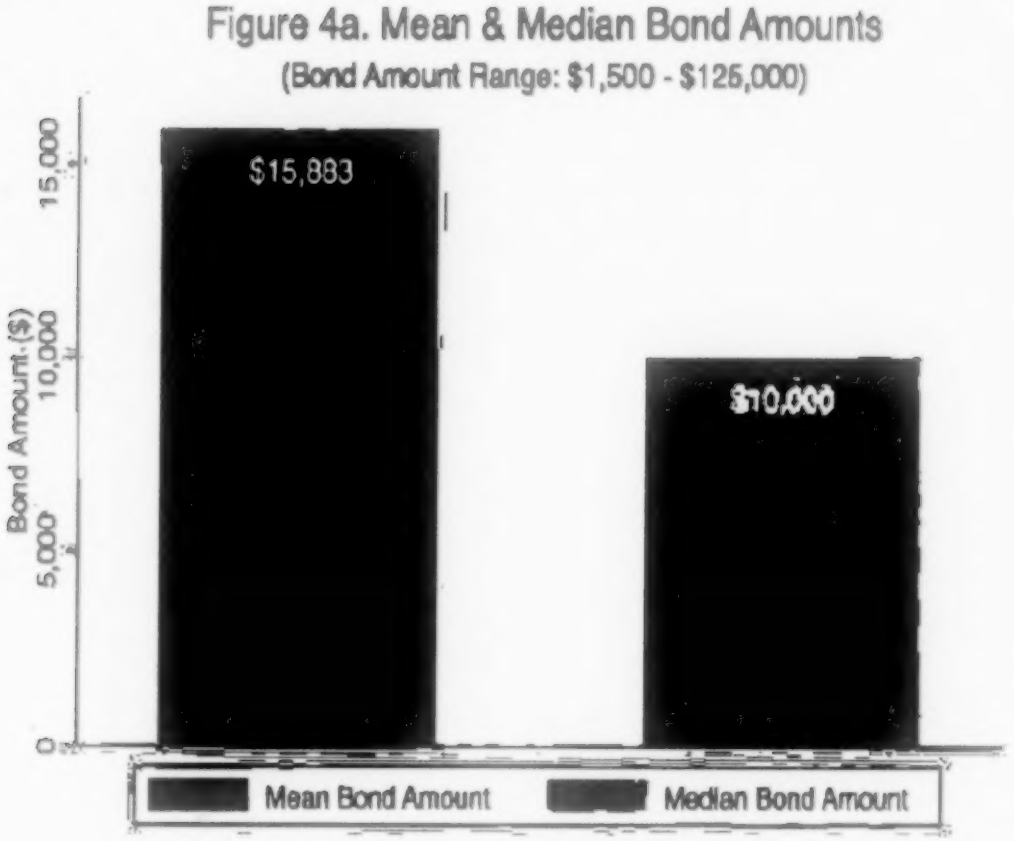
[4] Figures 3a and 3b present the distribution of bond amounts ordered for class members. Figure 3b includes the full range of bond amounts from $0 to $2,500,000, whereas Figure 3a is limited to bond amounts between $1,500 and $125,000. Figure 3a omits approximately 18 bond hearings (8 in which the amount of bond set was $0, and 10 in which the amount was greater than $125,000). Because Figure 3a is limited to a narrower range, it presents a more detailed distribution of bond amounts than does Figure 3b, which includes the full range.

Figure 3B. Hearing Outcome: Distribution of Bond Amounts

(Bond Amount Range Displayed: $0 - $2.5 million)



FIGURES 4a and 4b. Mean and Median Bond Amounts[5]



[5] Figures 4a and 4b present the mean and median bond amounts for class members corresponding to the figures reported in Figures 3a and 3b. Because Figure 3b includes the full range of bond amounts from $0 to $2,500,000, Figure 4b includes mean and median bond amounts using the whole range. Because Figure 3a is limited to bond amounts between $1,500 and $125,000, Figure 4a reports the mean and median bond amounts for bonds set within those ranges. The mean bond amount reported in Figure 4b is significantly higher than in Figure 4a because of the inclusion of the approximately 10 class members who received bond amounts in excess of $125,000.

Figure 4B. Mean & Median Bond Amounts

(Bond Amount Range: $0 - $2,500,000)

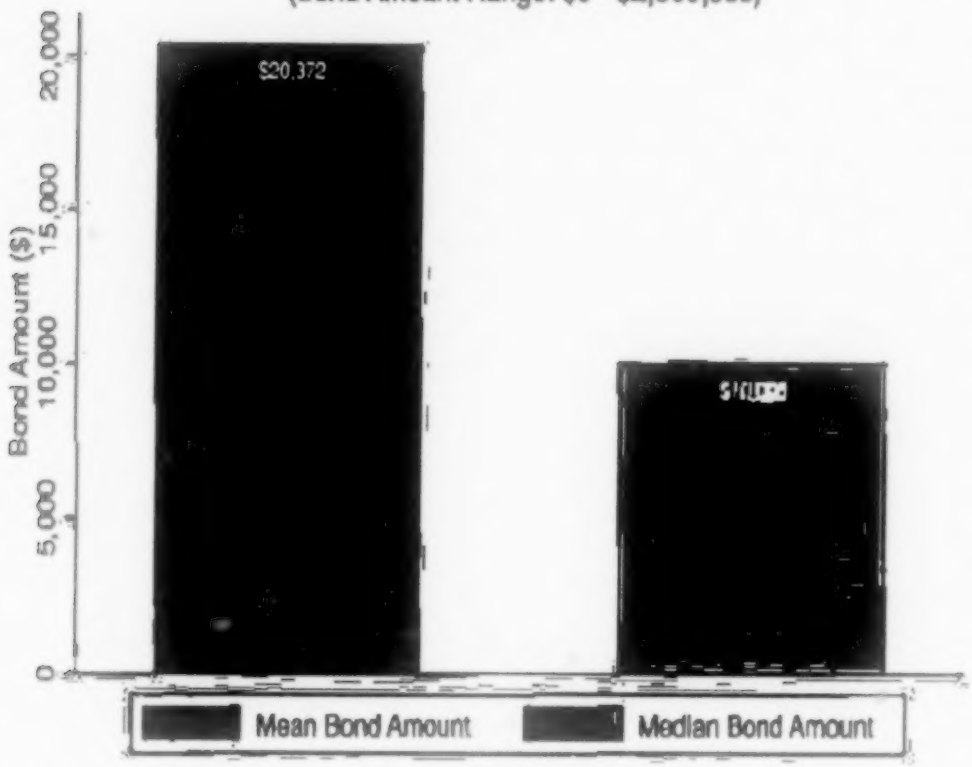
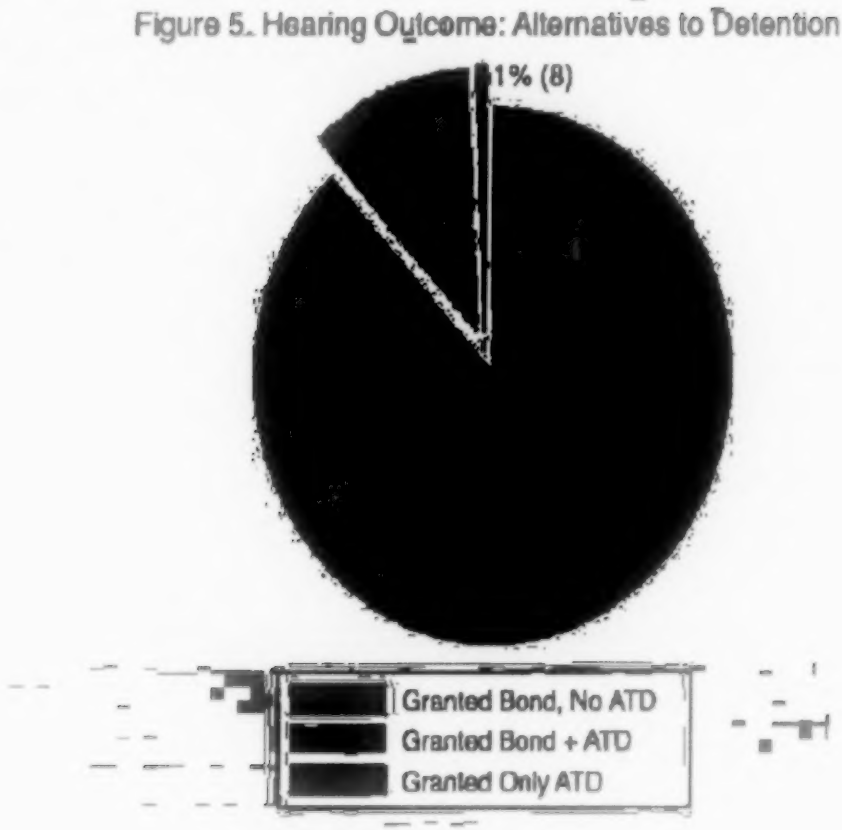
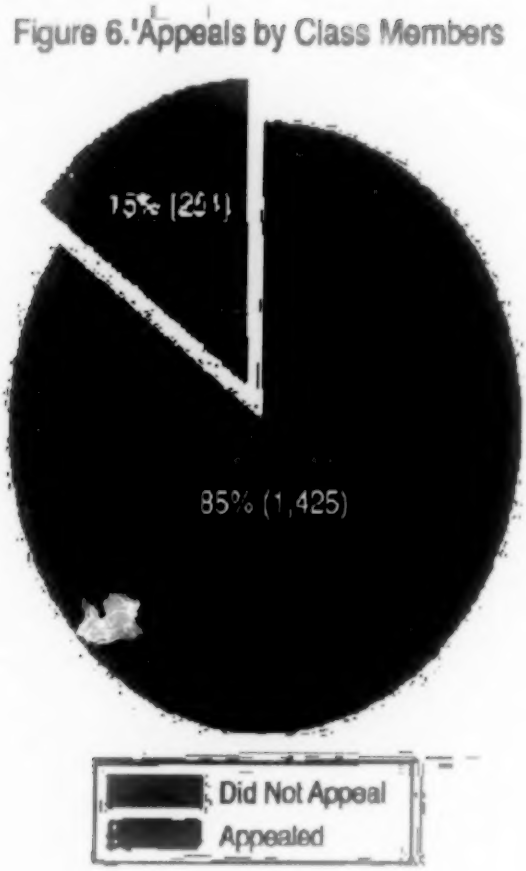


FIGURE 5. Alternatives to Detention[6]



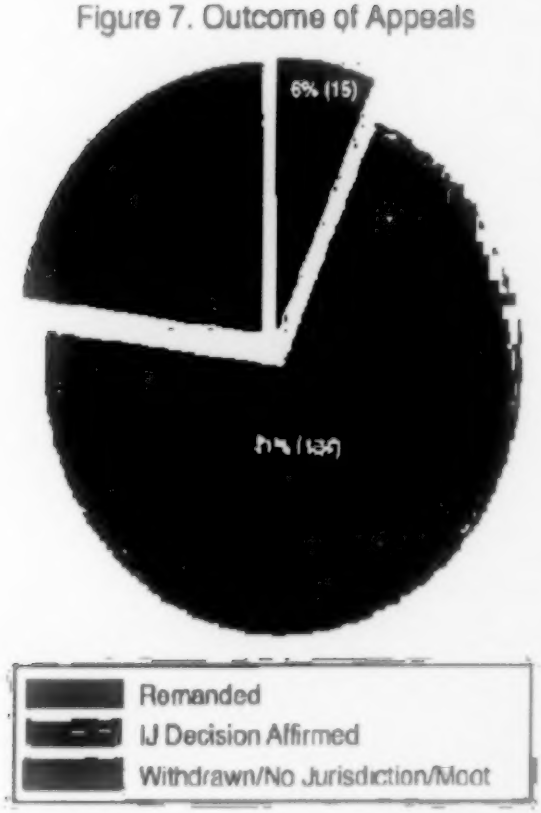
[6] "Alternatives to Detention" refers to conditions of release besides bond, such as electronic monitoring.

FIGURE 6. Appeals Taken[7]



[7] Figure 6 presents data on appeals taken by class members. According to the government's status reports, the government only produced information on appeals taken by class members. Therefore, this table summarizes no data on appeals taken by the government.

Figure 7. Appeals Outcomes[8]



[8] Figure 7 presents the outcomes of appeals taken by class members. The category "Remanded" refers to cases in which the outcomes was reported as "remanded" The category "IJ Decision Affirmed" includes cases in which the outcome was reported as "dismissed," "affirm decision," "summary affirmance," "sustain," or "dismiss appeal/affirm IJ decision." The category "Withdrawn/No Jurisdiction/Moot" includes cases in which the outcome was reported as "withdrawn/appeal withdrawn," "lacks jurisdiction," "moot bond," "pending" or "other."

Declaration of Alejandro Rodriguez

I, Alejandro Rodriguez, hereby declare:

1. I make this declaration based on my own personal knowledge and if called to testify I could and would do so competently as follows:

2. I was born on **[REDACTED]** 1978 in Juarez, Mexico. In 1979, at the age of 1, my parents brought me to the United States, and I have lived here ever since.

3. I grew up and received all of my education entirely in the United States, and I consider myself an American. My father became a naturalized United States citizen on September 17, 1986 and my mother is a Lawful Permanent Resident. I became a Lawful Permanent Resident on June 4, 1987. My brother is also a Lawful Permanent Resident and my younger sister was born here in the United States. I have 3 U.S. citizen children: my son **[REDACTED]** is 11 years old; my other son **[REDACTED]** is 5 ½ years old, and my daughter **[REDACTED]** is 2 ½ years old. Before my immigration troubles, I had a good job working as a dental assistant.

4. I have made some mistakes in my life. In 1998, when I was 20 years old, I was caught driving a stolen car. On July 29, 1998, I pled guilty to a violation of California Vehicle Code 10851(A) and was sentenced to 6 months, with 3 years of probation. In 2001, with just a few months left, I was found to be in violation of my probation and was sentenced to 2 years, of which I served 10 months.

5. In 2003, when I was about 24, I began to get involved with drugs. In October 2003, I pled no contest to and was convicted of Possession of a Controlled Substance, California Health & Safety Code 11377(a), for which I received 5 years of probation under California Prop 36, requiring me to take a course for drug rehabilitation. I no longer take or even associate myself with drugs, and I deeply regret ever being involved in the first place.

6. Before I had a chance to finish my drug classes under Proposition 36, I was turned over to ICE custody, on or about April 10, 2004. I was moved to the San Pedro Processing Center five days later, on or about April 15, 2004. At that time, an ICE officer told me that I could get out on $15,000 bond. However, I did not have that much money and could not pay it at that time. I have been detained ever since then—a time period of over three years.

7. At my hearing in June 2004, I believed the judge was going to grant me release because I was eligible for cancellation of removal. However, the government attorney then brought up my charges from 1998. The government also submitted evidence that, in October 2003, I was convicted of being under the influence of a controlled substance in violation of Health and Safety Code section 11550(a), for which the sentence was 120 days.

8. The judge decided in July 2004 that I was not eligible for cancellation because she said that my theft conviction was an aggravated felony, and she ordered me deported to Mexico. I was confused and did not know what to do. I could not comprehend how I could

be sent to live in a country I did not know, where I had not lived since I was one year old.

9. I appealed my case to the BIA, but in December 2004 I lost. The BIA agreed I was an aggravated felon and ineligible for cancellation. Although I was beginning to become depressed about my ongoing detention, I appealed my case to the Ninth Circuit because the only other option would be to accept deportation to a country I have never known. I honestly believe that my crime is not an aggravated felony, and I decided to fight so I could stay in my home country and be near my children and family.

10. My case has been pending at the Ninth Circuit for a long time because the government kept asking to hold my case in abeyance until the Supreme Court decided a similar case. After more than two years during which I waited in detention, the Supreme Court made its decision around February 2007. But from what my lawyer told me, the Court did not decide the main issue in my case, which is whether a joyriding violation of Cal. Vehicle Code 10851 is a theft offense under the immigration laws. Now I have to appeal once again to the Ninth Circuit, which I understand could add another year or more to my detention.

11. On March 10, 2005 an officer handed me a piece of paper and told me that I was going to stay in detention until I was removed. I figured out that this was called a custody determination, and I have become very familiar with these in my 3 years in detention. Before this custody determination, I had been given a questionnaire which asked about my family, my previous employment, and my address. I filled it out,

explaining that I had family in the area, that I could live with my mother if released, and that I had held a job as a dental assistant. I really felt that this would be enough to allow me to be released. Unfortunately, my paper determination informed me that I would remain detained until the Ninth Circuit decides my case. I wish it had told me what else I could prove in order to be released, as I desperately just wanted to see my family, especially my new baby girl, who had just been born while I was in ICE detention.

12. I received 3 more custody determinations during my detention. In September 2005 and March 2006, I was told verbally that I would remain detained because I was a flight risk, but I was not given any papers regarding these custody determinations. In March 2007, I received my fourth custody determination, which was given to me in writing like my first one. Aside from the different dates on them, they were so similar that they seemed like carbon copies of each other. I was never given another questionnaire to fill out, and I was never interviewed in relation to any of my custody determinations. The last one, in March 2007, also claimed that my removal was imminent. But I know this is not true, because my case has been set for more briefing in the Ninth Circuit, in light of a recent Supreme Court case.

13. I have learned a lot during the years since those convictions. I have already missed my baby daughter's first smile, her first words, and her first steps. I am fighting my case so hard because I am fighting to stay in her life. I can not imagine being forced to live in a country I do not know, deported from my homeland, and unable to see my children grow up.

I know that I have made mistakes in the past, but I will never do anything to separate me from my loved ones again. I am desperate to be released from detention so I can be a part of my family's lives again. If given another opportunity, I know I will make better decisions.

14. During my years in detention, I have seen at least dozens of other people who had been held for more than six months. Many of them were held for years like me. Based on my conversations with these men, I know that many of them never got bond hearings, while others got hearings at the beginning of their detention, but not afterwards.

I declare under penalty of perjury of the laws of the State of California and the United States that the foregoing is true and correct. Executed this 10th day of May, 2007 in Los Angeles, California.

/s/ ALEJANDRO RODRIGUEZ
ALEJANDRO RODRIGUEZ

Dated: 5-10-07

Declaration of Alejandro Rodriguez

I, Alejandro Rodriguez, hereby declare:

1. I make this declaration based on my own personal knowledge and if called to testify I could and would do so competently as follows:

2. On July 27, 2007, I was released under an order of supervision from San Pedro Service Processing Center in San Pedro, California, after more than three years and three months in detention.

3. As one of the conditions of my release, I am required to wear an electronic ankle monitor at all times, so that immigration authorities can always be aware of my location. In addition, I am required to be within 50 feet of my home address between the hours of 7 p.m. and 7 a.m. I was informed of these conditions verbally by the officers who released me, and I was also given paperwork which confirms these conditions.

4. Because of these restrictions, I must spend every night at my mother's house, which is the address I listed with immigration authorities as my home address. I listed her house, as opposed to my father's or girlfriend's, because hers was the only home that immediately had an available phone line, which was necessary to support the technology of the electronic ankle monitor. I am relieved to be spending my nights outside the detention center, in my own bed in my own room at my mother's house, but I regret that I am unable to spend any evenings with my father, who had been so supportive of me during my time in detention. I also regret that I can not tuck my children

into their own beds, because I have to report back to my mother's house by 7 p.m. every day.

5. While I am grateful that immigration authorities finally chose to conditionally release me from San Pedro Processing Center, I would have strongly preferred a hearing before an Immigration Judge, where I could have demonstrated that I am not a danger to society nor a flight risk. With such a hearing, I would hope to convince the judge that I deserve more lenient conditions of release, which would allow me to spend more time with my family. I have already lost over three years with them, and I am anxious to spend as much time with them as possible to make up for this lost time.

I declare under penalty of perjury of the laws of the State of California and the United States that the foregoing is true and correct. Executed this 13th day of Aug., 2007 in Los Angeles, California.

/s/ ALEJANDRO RODRIGUEZ
ALEJANDRO RODRIGUEZ

Alejandro Rodriguez Order of Supervision

A 41-551-486

C

*** CONFIDENTIAL PARTICIPANT INFORMATION ***

WEB ENROLLMENT FORM

ELECTRONIC MONITORING SYSTEMS, INC.

Participant's Name	Agency Name
RODRIGUEZ MORALES, ALEJANDRO	ICE-LOS ANGELES
Street Address	**Officer Name**
6143 EASTON AVE	[illegible] Sifuentes
City, State Zip Code	**Time Zone** / **Web Enroll Date** / **Web Enroll Time**
LOS ANGELES, CA 90022	07/26/2007 17:44

Authorized Telephone Numbers	
Phone Number	**Phone Type**
(323) 887-3537	Home

☐ ☒ ☐ ☐

Watch Serial	MAU Serial
42722	44989
Quiet Period Length	**Start of Quiet Period**
24	0000

	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
Leave	0700	0700	0700	0700	0700	0700	0700
Return	1900	1900	1900	1900	1900	1900	1900
Leave							
Return							
Leave							
Return							

No Leaves Will Be Authorized Unless Specified in the Table Above

www.uscis.gov

I-765

(C18)

*** CONFIDENTIAL PARTICIPANT INFORMATION ***

15720 Frailey

Compton 90221

632-5464

U.S. Department of Homeland Security
U.S. Immigration and Customs Enforcement

Order of Supervision

File No: A41 551 486
Date: July 27, 2007

Name: RODRIGUEZ-Morales, Alejandro

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On 12/21/2004 (Date of final order) you were ordered

- ☐ Excluded or deported pursuant to proceedings commenced prior to April 1, 1997
- ☒ Removed pursuant to proceedings commenced on or after April 1, 1997.

because ICE has not effected your deportation or removal during the period prescribed by law, it is ordered that you be placed under supervision and permitted to be at large under the following conditions:

- ☒ That you appear in person at the time and place specified, upon each and every request of ICE, for identification and for deportation or removal.
- ☐ That upon request of ICE, you appear for medical or psychiatric examination at the expense of the United States Government
- ☒ That you provide information under oath about your nationality, circumstances, habits, associations, and activities and such other information as ICE considers appropriate.
- ☒ That you do not travel outside CALIFORNIA (Specify geographic limits, if any) for more than 48 hours without first having notified this ICE office of the dates and places of such proposed travel.
- ☒ That you furnish written notice to this ICE office of any change of residence or employment within 48 hours of such change.
- ☒ That you report in person, on ~~Second & fourth of every month~~ Beginning 8-15-07, to the ICE office at:
  300 N. Los Angeles St., Rm 2204, L.A. CA 90012, unless you are granted written permission to report on another date.
- ☒ That you assist U.S. Immigration and Customs Enforcement in obtaining any necessary travel documents.
- ☒ Other: You shall obey all local, state and federal laws.
- ☒ See attached sheet containing other specified conditions (If continued on separate sheet if required)

Ofcr. Sifuentes
213-830-7981

James Hayes (for)
(Signature of ICE official)

James T. Hayes, Jr., Field Office Director
(Print name and title of ICE official)

Alien's Acknowledgment of Conditions of Release under an Order of Supervision

I hereby acknowledge that I have (read) (had interpreted and explained to me in the English language) the contents of this order, a copy of which has been given to me. I understand that failure to comply with the terms of this order may subject me to a fine, detention, or prosecution.

Exhibit 9
29

(Signature of ICE official serving order) (Signature of alien) 7/27/07 (Date)

U.S. Department of Homeland Security
U.S. Immigration and Customs Enforcement

Continuation Page for Form: I-220B

Alien's Name	File Number	Date
RODRIGUEZ-Morales, Alejandro	A41 551 486	July 27, 2007

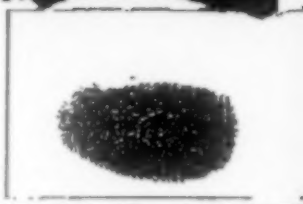
[redacted]

Alien's Signature

Alien's Address

Y6143 EUSTON ST
Los Angeles Ca
90022
323-887-3537

Alien's Telephone Number (if any)



PERSONAL REPORT RECORD

DATE	OFFICER	COMMENT/CHANGES

Signature

Title
DEPORTATION OFFICER

Exhibit 9
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U.S. Department of Homeland Security
U.S. Immigration and Customs Enforcement

Order of Supervision

File No A41 551 486
Date: July 27, 2007

Name: RODRIGUEZ-Morales, Alejandro

☒ That you do not associate with criminals or members of a gang that is known to be involved in criminal activity.

☐ That you register in a substance abuse program within 14 days and provide Immigration and Customs Enforcement (ICE) with written proof of such within 30 days. The proof must include the name, address, duration, and objectives of the program as well as the name of a program counselor.

☐ That you register in a sexual deviancy counseling program within 14 days and provide ICE with written proof of such within 30 days. You must provide ICE with the name of the program, the address of the program, the duration and objectives of the program, and the name of a program counselor.

☐ That you register as a sex offender, if applicable, within 7 days of being released, with the appropriate agency/agencies and provide ICE with written proof of such registration within 10 days.

☒ That you do not commit any crimes or be associated with any criminal activity while on this Order of Supervision.

☐ That you report to a parole or probation officer as required within 5 business days and provide ICE with written verification of the officer's name, address, telephone number, and reporting requirements.

☒ You must follow all reporting and supervision requirements as mandated by the parole or probation officer.

☐ That you continue to follow any prescribed doctor's orders whether medical or psychological, including taking prescribed medications.

☐ That you make good faith and timely efforts to obtain a travel document and assist ICE in obtaining a travel document.

☐ That you submit a complete application for a travel document to all appropriate Embassies or Consulates, including those representing the countries of Mexico. You must present ICE with evidence that each Embassy or Consulate to which you apply has received your request and all required documents. This may be done, for example, by mailing your application(s) with a request for return receipt and providing the signed return receipt to ICE, by obtaining a tracking number when you mail your application(s) and providing the number to ICE, or by submitting written confirmation of receipt issued by the Embassy or Consulate.

☐ That you submit your application(s) for a travel document to all appropriate Embassies or Consulates and provide proof of receipt to ICE on or before _____.

☐ That you provide ICE a copy of your application(s) for a travel document that you submit to any Embassy or Consulate, including all supporting documents, photos, and other items provided to the Embassy or Consulate to support your application(s).

☐ That you provide ICE a copy of all correspondence related to your travel document application(s) that you

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send to, or receive from, an Embassy or Consulate.

☐ That you contact the Embassy or Consulate within 21 calendar days of making your application(s) to confirm that the information you provided is sufficient.

☐ That you comply with any requests from an Embassy or Consulate for an interview and make good faith efforts to submit further documentation if required by the Embassy or Consulate.

☐ Every time you report in person under this order of supervision, you must inform the local ICE office of all actions you have taken to obtain a travel document. You must provide any available written documentation to ICE regarding these actions and the status of your travel document application(s).

☐ That you provide ICE, upon request, with any and all information relevant to application(s) for a travel document. This may include, but is not limited to, information regarding your family history, including dates of birth, nationalities, addresses, and phone numbers as requested for such persons, whether in your country of nationality and/or citizenship or elsewhere, and your past residences, schools attended, etc.

☒ You will participate in a supervised release program, as described in the attached document. You will comply with the rules and requirements of this program, and cooperate with its administrators.

I agree to comply with the rules, requirements, and administrators in the supervised release program described in the attached document.

Alien's signature X [signature] Date 1/27/07

☐ Other. _____

Any violation of any of the above conditions may result in a fine, more restrictive release conditions, return to detention, criminal prosecution, and/or revocation of your employment authorization document.

Alien's Acknowledgement of Conditions of Release under an Order of Supervision

I hereby acknowledge that I have (read) (had interpreted and explained to me in the English language) the contents of this order and addendum, a copy of which has been given to me. I understand that failure to comply with the terms of this order and addendum may subject me to a fine, more restrictive release conditions, detention, criminal prosecution, and/or revocation of my employment authorization document.

[signature] [signature] 1/27/07

(Signature of ICE official serving order) (Signature of alien) (Date)

Please note that all references in this order/addendum to "INS" or "Service" should now be considered to refer to U.S. Immigration and Customs Enforcement (ICE).

Updated 4/25/2005

Exhibit 9
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Declaration of Abel Perez Ruelas

I, Abel Perez Ruelas, hereby declare:

1. I make this declaration based on my own personal knowledge and if called to testify I could and would do so completely as follows:

2. I was born on [**REDACTED**] 1967 in Jalisco, Mexico. I was admitted to the United States in 2002 on a visitor's visa.

3. In 1996, I began a relationship with Maria del Rosario and we had a daughter, [**REDACTED**], one year later. In 2000, we broke up and I lost contact with Ms. del Rosario. In 2007, my mother informed me that Ms. del Rosario had died in childbirth and my daughter was living with her mother's parents. It is my great hope that someday I can bring my daughter to live with me in the United States.

4. On December 22, 2008, I married Maria Yolanda Perez Navichoque, a United States citizen. She works as a nurse at the Los Angeles Jewish Home, a non-profit senior living facility in Reseda, California. In February 2009, we filed to adjust my immigration status to a lawful permanent resident based on our marriage.

5. After marrying Ms. Perez, I became a stepfather to her four children, who are all United States citizens. The two youngest children live with me and my wife in our home in Reseda, California.

6. During the eight years I have lived in the United States, I have worked in construction jobs involving cement and tile work. Prior to my immi-

gration troubles, I regularly attended church with my wife in Pacoima and Reseda.

7. I have made some mistakes in the last few years that I greatly regret. I have been convicted of driving under the influence on three occasions. I served three months of probation for the first offense in 1994, served 15 days in jail for the second offense in 2004, and served 60 days in jail for the third offense four years later. I know that I foolishly put myself and others at risk by driving under the influence and I deeply regret my decision to abuse alcohol.

8. After completing my sentence for my last conviction, I have diligently attended Alcoholics Anonymous meetings for over a year and have continued attending AA meetings while in immigration detention to further my rehabilitation. I am determined not to repeat my mistakes.

9. When I was released from jail on approximately April 8, 2009, ICE immediately took me into immigration custody even though I was in the process of adjusting my status to become a lawful permanent resident, and even though DUI is not a removable offense. For the past 18 months, I have been held in ICE custody at Mira Loma Detention Center. My attorneys tell me that I am being held under 8 U.S.C. 1226(a).

10. On April 21, 2009, I was given a bond hearing where I bore the burden of proving that I was not a danger to the community or a flight risk. The judge denied my bond, finding that I was a danger to society based on my prior DUI convictions, even though the immigration judge knew I was married to a United

States citizen and had a pending application to adjust my status to become a lawful permanent resident.

11. With the help of an attorney I applied for a bond reduction in February 2010. At the hearing the immigration judge set bond at $5,000, an amount too high for my family to pay, especially given that I am in detention and not available to work to support my family. Because of my inability to pay, I have remained in immigration detention for 18 months while waiting adjudication of my case. My last hearing was on approximately September 2, 2010. At the hearing, my attorney informed the judge that my application to adjust status had been granted, and presented letters from my family and my tax records. But the judge refused to reduce my bond, based on my prior DUI convictions. My next hearing is scheduled for December 3, 2010.

12. On July 30, 2010, my wife and I received news that my application to adjust my status had been approved, with a priority date of March 22, 2009. I am overjoyed that I will be able to remain in the United States as a permanent resident with my family. However, even though I am able to adjust my status immediately, I remain in ICE detention because the immigration judge set a high bond, which my family still cannot afford to pay. I don't understand why ICE continues to hold me even though my application to adjust has been granted.

13. It has been very difficult to be separated from my wife and my step-children for so long. My detention has been a tremendous burden on my family, who depend on me to support them. I miss being with my

family and I am anxiously waiting to be re-united with them. I also have found it difficult to stay in touch with my attorney to fight my removal case while at Mira Loma. I am very thankful that my application to adjust status has been granted, even with all the difficulties I have faced in detention.

14. While at Mira Loma, I have learned that there are many other people like me who are held in detention for long periods of time even though they don't present a flight risk or danger, and have strong claims to remain in the United States. I don't think it is right for ICE to hold people for long periods without giving them a hearing where ICE has to justify the detention.

15. I understand that I am a named plaintiff in this class action lawsuit and I understand my responsibilities. I have spoken with my attorneys about my role, and know that I need to stay informed with what is happening in the case and to make decisions that are in the best interests of the class as a whole. I am prepared to fulfill these duties and represent the class.

I declare under penalty of perjury of the laws of the State of California and the United States that the foregoing is true and correct. Executed this 12th day of Oct., 2010 in Lancaster, California.

/s/ ABEL PEREZ RUELAS
ABEL PEREZ RUELAS
A# 095-788-558

Declaration of Michael Tan (excerpts)

Summary of A Files for Class Members Not Including the 1225(b) Subclass

15. We first analyzed the A files of class members without including the A files of members of the 1225(b) Subclass. A files were determined to be associated with a person in the 1225(b) Subclass using the methodology described in the concurrently-filed Declaration of Michael Kaufman ¶¶ 7-11.

16. Based on our review of A files associated with persons in the 1225(b) Subclass, such persons were detained upon their arrival to the United States at a port of entry, almost always after making a request for asylum or expressing fear about returning to their country of origin review. As a result, these files are far less likely to contain information about family ties.

17. Not including members of the 1225(b) Subclass, the A files of in period class members contained the following information:

a. 412 A files contained information indicating whether the class member had a child or children in the United States. Of these, 251 class members had a child or children who resided in the United States.

b. 407 A files contained information indicating whether the class member had a child or children with U.S. citizenship. Of these, 238 class members had a child or children with U.S. Citizenship.

c. 445 A files contained information indicating whether the class member had a spouse who resided in the United States. Of these, 147 class members had a spouse who resided in the United States.

Summary of A Files for Class Members Inclusive of the 1225 Subclass

18. For the purposes of completeness, we also analyzed the A files of all 610 class members. These A files contained the following information:

a. 463 A files contained information indicating whether the class member had a child or children who resided in the United States. Of these, 254 class members had a child or children who resided in the United States.

b. 455 A files contained information indicating whether the class member had a child or children with U.S. citizenship. Of these, 240 class members had a child or children with U.S. Citizenship.

c. 498 A files contained information indicating whether the class member had a spouse who resided in the United States. Of these, 150 class members had a spouse who resided in the United States.

Summary of A Files for Class Members Within the 1226(c) Subclass

19. We also separately analyzed the A files of those persons within the 1226(c) Subclass. A files were determined to be associated with a person within the 1226(c) Subclass using the methodology described in the concurrently-filed Declaration of Michael Kaufman ¶¶ 12-18.

20. The A files contained the following information:

a. 211 A files contained information indicating whether the class member had a child or children who resided in the United States. Of these, 138 class

members had a child or children who resided in the United States.

b. 210 A files contained information indicating whether the class member had a child or children with U.S. citizenship. Of these, 130 class members had a child or children with U.S. Citizenship.

c. 215 A files contained information indicating whether the class member had a spouse who resided in the United States. Of these, 77 class members had a spouse who resided in the United States.

c. 66 had resided in the United States for 20 years or more prior to detention.

Length of Residence for All Class Members

30. For purposes of completeness, we also analyzed length of residence for all class members, inclusive of the Section 1225 subclass. ICE-EDI-010 contained sufficient information for us to calculate the length of residence for 314 class members. ICE-EDI-010 contained information stating that:

a. 192 had resided in the United States for at least 5 years prior to detention;

b. 141 had resided in the United States for at least 10 years prior to detention; and

c. 66 had resided in the United States for 20 years or more prior to detention.

Length of Residence for Members of the 236(c) Subclass

31. Using the methods referenced above, we also analyzed length of residence for members of the Sec-

tion 1226(c) subclass. ICE-EDI-010 contained sufficient information for us to calculate the length of residence for 107 class members. ICE-EDI-010 contained information stating that:

a. 88 had resided in the United States for at least 5 years prior to detention;

b. 67 had resided in the United States for at least 10 years prior to detention; and

c. 37 had resided in the United States for 20 years or more prior to detention.

Age of Class Members At the Time of Entry Into the United States

32. I also supervised legal support staff to calculate class members' age at the time of the date provided in "Entry Date" field using the information provided in the "Birth Date" field. I checked the calculations for a sample of class members in order to ensure their accuracy.

33. Where there were multiple "Entry Dates" for the same class member, we used the earliest date of entry into the country. In many cases, there was no information in the "Entry Date" field. In these cases, we therefore could not determine the class member's age at the time of entry into the country.

34. As with the summaries provided above, we excluded individuals who were likely not class members. Due to technical difficulties, we were unable to isolate the class members who were "in-period" or the class members within the Section 1225 and Section 1226(c) Subclasses. Thus, we could not provide data summaries regarding age along the same lines as the data

summaries provided above. We will submit a supplemental declaration with those summaries once those technical difficulties are resolved.

35. ICE-EDI-010 contains sufficient information to determine the age at the time of entry for 642 individuals included in the spreadsheet. Of those individuals:

a. 325 were 21 years old or younger on the date of entry.

b. 294 were 20 years old or younger on the date of entry.

c. 224 were 19 years old or younger on the date of entry.

d. 191 were 18 years old or younger on the date of entry.

Exhibit F: Deposition of Eric G. Saldana (excerpts)

Los Angeles, California

Friday, January 13, 2012

Volume 1

* * * * *

[9]

A. Yes.

Q. Do you see at the bottom of the page topic number four?

A. Yes.

Q. Are you the person most knowledgeable about this topic at the Department of Homeland Security?

MR. ATKINSON: I'm sorry, could he just take a moment to read the topic?

MR . KAUFMAN: Sure.

THE WITNESS: I've read it and I'm able to speak to this.

BY MR. KAUFMAN:

Q. You are the person most knowledgeable at the Department of Homeland Security on this topic?

A. Yes.

Q. Could you turn to the next page and take a moment to read over what is listed as topic number seven.

A. Yes.

Q. Are you the person most knowledgeable at the Department of Homeland Security on this topic?

A. Yes.

MR. ATKINSON: Just—when we earlier designated Mr. Saldana, it was with regard to topic number seven with respect to the notification provided [10] to persons eligible for such hearings, not with respect to how hearings are conducted, which was the topic, I believe, we designated Judge Wyle for for the Department of Justice.

BY MR. KAUFMAN:

Q. Mr. Saldana, could you please turn what is marked as Page 10 in this document and take a moment to read over topic number ten at the bottom of the page.

A. Yes.

Q. Are you the person most knowledgeable at the Department of Homeland Security on topic number ten?

A. Yes.

Q. Now, finally, please turn to the next page and take a moment to look over topic number eleven.

Are you the person most knowledgeable at the Department of Homeland Security on topic number eleven?

A. Yes.

Q. Great. So, Mr. Saldana, what did you do to prepare for this deposition?

A. In addition to my experience in working with these different aspects that you pointed out earlier, I have prepared with the attorneys that you see present with me today.

* * * * *

[37]

or would not allow them to be released, and for the most part they understand the thought process of the person making that decision. And if there's something outside the norm, they'll usually make that recommendation, give that information to the determining official.

The processing officer does just that, processes the case, prepares the forms, prepares the worksheets, puts the A-File together and gives that to the supervisor, the SDDO, who then reviews everything and then he's the one who does the determination.

Q. So he would make a determination whether someone was subject to mandatory detention, for example?

A. Yes.

Q. Would he also be the person if someone, let's say, released on bond that would make the determination as to whether to release that person and the amount of bond?

A. Yes.

Q. When the SDDO makes those initial determinations, besides the processing agent are there any other ICE officials involved in the decision-making process?

* * * * *

[106]

some type of bond; but that same person comes in and we learn information that maybe there's an issue with a family member, maybe a medical issue with a family member, child is sick, single parent. That's something we want to really push to get them back to his family, so we would consider the ATD option. And ATD, I mean Alternatives to Detention. That's what we would call it.

Q. When ICE officials make that initial custody determination, do they sometimes—is the determination release on a particular ATD program?

A. Based on the documents that I reviewed for this case, there was a lot of mention of multiple ATD programs. Since, I believe it was, November of 2009, the contractors that we use for those programs—I don't think they consolidated, but we chose one. There was multiple contractors that we used previous to that.

That contractor has created something called ISAP-2, so that is the form of Alternatives to Detention that we use. And in reading through some of this material that was submitted to you, I saw that there was mentioned an EMD, electronic monitoring device, and other programs that were part of G4S Corporation that no longer holds the contract with us.

[107]

So if a supervisor decides to do Alternatives to Detention, it's with ISAP program or the B.I. Corpo-

ration. So it's—there's not as many types available to the supervisor to choose from.

Q. So if I understand, there's only one type available now in the L.A. field office, the ISAP-2 program?

A. There's one provider. There's the ISAP-2 program, and in that program there's various levels of supervision that take place. There's three common ones or the three of them are GPS or technology, which is what they sometimes refer to as full service; there's a telephonic T/O, which is—in which the alien is monitored by the contractor and still—and has to do a telephonic call-in system; and there's T/R, which is a system made available that we've contracted with B.I. for but ICE maintains the supervision over and the management of.

Q. Are the SDDOs aware of all these programs, these options?

A. They may not have specific knowledge of each, but every program works a little bit differently. And at the time that SDDO determines to turn someone over to ATD, they don't necessarily choose ATD this or that; it will usually go to an ATD officer who makes

* * * * *

[111]

ISAP's, but it's an ICE agent or officer actually doing the review of the cases.

BY MR. KAUFMAN:

Q. In your experience has the use of ATDs in the L.A. field office changed the way that officials go about assessing flight risk in that initial determination?

A. I think I could say yes to that.

Q. In what way?

A. It's another option. The concern for anybody who has to set bond or decide whether somebody is going to stay in custody or not is am I making the correct decision, is this person that will be released on his own recognizance, whether it's under a bond or something else, will they come back and re-offend, one; will they come back for their hearing.

I think, although it isn't the case every time, ATD has shown to be more of a positive influence for those individuals taking part in the program. We see a good success rate on that. So therefore I think it makes the supervisors more comfortable to use that program. But then again there are issues that come up where people take advantage of the system, which also puts them back.

Q. When you say success rate, what do you mean [112] by that?

A. Success rate traditionally has been tracked with what they call a compliance rate. And a compliance rate for B.I.—they manage a number of different performances that they consider compliance, whether it has to do with people showing up for interviews, home visits, or whether the alien goes to their court hearing.

It's—I think it's been successful in terms of compliance to get people to their court proceedings. It's a very impressive system.

Earlier this year my specific office in San Bernardino—we had a compliance rate of about 60 percent for people going to their immigration hearing. We had a brainstorming session and thought about existing protocols in the program and how we could use them to better increase that particular number. And by making some changes we are at, if not close to, 100 percent compliance rate for people to go to their immigration court hearing pre-order.

Q. Is that in the San Bernardino area or—

A. That's in the San Bernardino area. And throughout Los Angeles it's probably in the 90th percentile, I would estimate.

MR. ATKINSON: I'm sorry, I'm trying to jump

* * * * *

[134]

BY MR. KAUFMAN:

Q. I see. But your best understanding is it's increased substantially in the last five years?

MR. ATKINSON: Object to the form. Object, outside the scope.

THE WITNESS: I see no reason not to agree with that.

BY MR. KAUFMAN:

Q. When was the most recent increase in availability of placements in the ISAP program?

A. I could not answer that specifically, the numbers that we have. It may vary, but I'm talking, you know, within 20 or 30. And it may be a case where the—my particular office, for example, the cap of available positions in San Bernardino is just over 1100. There may be a case where Los Angeles may need some of those slots and we may in between us move them.

So it's—to my knowledge, the cap across the field office is about 3,000, of which about 1100, maybe 1150, are in San Bernardino. About the same in Los Angeles. And about seven and some change down in Santa Ana. And at any time, because of the amount of personnel, it could change.

So it would be hard for me to—I don't run

* * * * *

[139]

paragraph below number one on Page 1 of the document. The first sentence states, "ATD is not recommended for aliens who pose a minimal flight risk."

From ICE's perspective what constitutes, quote - unquote, a minimal flight risk?

A. It would be somebody who has major ties to the community who may have a question as to removability possibly—and these are the extremes—somebody who is awaiting a benefit. Cases such as that. I think it would also be cases in which we would determine upon

initial determination that they would be released O/R, Order of Recognizance.

Q. If someone is released O/R, are there no conditions placed on their release?

A. Usually there's a condition that they have to report back in the office and they have to, of course, go to their court hearings.

Q. Is eligibility for relief a consideration in determining whether someone is a flight risk?

MR. ATKINSON: Object to the form of the question.

THE WITNESS: As I stated before, it's not necessarily—not always a part of it, not necessarily a major part of the decision, for the custody decision which this is part of. But it can—

* * * * *

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I, the undersigned, a Certified Shorthand Reporter of the State of California, do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth; that any witnesses in the foregoing proceedings, prior to testifying, were placed under oath; that a verbatim record of the proceedings was made by me using machine shorthand which was thereafter transcribed under my direction; further, that the foregoing is an accurate transcription thereof.

I further certify that I am neither financially interested in the action nor a relative or employee of any attorney of any of the parties.

IN WITNESS WHEREOF, I have this date subscribed my name.

Dated: Feb. 8, 2012

/s/ IRMA C. HOGAN
IRMA C. HOGAN, CSR 4877

Exhibit G: Telephonic Deposition of Honorable Jack H. Weil (excerpts)

* * * * *

[61]

Central District of California?

A. Yes.

Q. Great. You started to explain how bond hearings—how someone requests a bond hearing or doesn't and how the scheduling of a bond hearing happens. Can you just give me a description of that process, how someone asks for a bond hearing and then how it comes to be scheduled?

A. Yes. The Department of Homeland Security will make a custody determination. The jurisdiction vests with the immigration court over the removal procedure via the filing of the notice to appear.

The notice to appear will include the initial custody determination from the Department of Homeland Security and the indication whether the respondent is or is not requesting redetermination of that.

When that is filed with the Court, the Court clerk will then schedule the hearing based upon what the respondent has indicated, either they do or do not the request a hearing. There is a little bit of variance among the judges in—for efficiency purposes, but it doesn't affect the substantive, as to whether the matter is put onto a separate bond calendar or just an initial hearing that includes both bond and non-bond matters.

* * * * *

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what the alternative possibilities are. So until you—I'm sure you can craft an alternative, but I don't know what those alternatives are. I don't know what is possible, what's legally appropriate, what—so I—

Q. And so when judges conduct bond hearings, is the availability for an alternative to detention program one of the factors to keep in mind when you make the bond decision?

A. When we talk about a bond decision, the judge—DHS makes the initial custody determination. So the immigration judge does not have the authority to order somebody into an ICE-run program.

Q. Is the Immigration Judge's authority limited to ordering release on bond at a bond hearing?

A. No.

Q. Okay. If an Immigration Judge is going to order release, is their authority limited to ordering release on bond?

A. There's a dispute among judges as to whether you can release somebody on their own recognizance, but the statute says a minimum amount of bond is $1500.

Q. Can you maybe describe that dispute in a little more detail? What is that controversy?

MR. LAWRENCE: I object to this as being outside of the scope of the deposition.

* * * * *

Declaration of Stacy Tolchin

1. I make this declaration based on my own personal knowledge and if called to testify I could and would do so competently as follows:

2. My name is Stacy Tolchin. I am an immigration attorney in private practice in Los Angeles, CA.

3. I graduated from UCLA Law School in 2001. From 2001-2010, I was employed by Van Der Hout, Brigagliano & Nightingale, LLP, where I specialized in complex removal cases in immigration court, appeals before the Board of Immigration Appeals and Administrative Appeals Office, and petitions for review before the U.S. Court of Appeals for the Ninth Circuit. In 2010, I opened my own practice, the Law Offices of Stacy Tolchin, where I continue to practice immigration law.

4. I have litigated a number of cases in federal district court and at the Ninth Circuit, including *Husyev v. Mukasey*, 528 F.3d 1172 (9th Cir. 2008), *Silaya v. Mukasey*, 524 F.3d 1066 (9th Cir. 2008), *Padilla-Padilla v. Gonzales*, 463 F.3d 972 (9th Cir. 2006), and *Singh v. Still*, 470 F. Supp. 2d 1064 (N.D. Cal. 2007). I have received numerous awards and recognitions for my work, including the American Immigration Lawyers Association Jack Wasserman Memorial Award for excellence in the field of litigation in 2009, the American Civil Liberties Union of Southern California Equal Justice Advocacy Award in 2009, and the National Immigration Law Center Annual Award in 2008. In addition, I currently serve on the Advisory Committee for the American Immigration Council and the Board of Directors of the National

Immigration Project of the National Lawyers Guild, and serve on the Rules Committee of the U.S. Court of Appeals for the Ninth Circuit.

5. I regularly represent individuals in immigration bond hearings conducted pursuant to *Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942 (9th Cir. 2008), *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011) (*Diouf II*) and the preliminary injunction order in *Rodriguez*. Over the course of my over 11 year career, I conservatively estimate that I have represented 4-7 individuals in *Casas/Diouf* hearings. I conservatively estimate that I have represented 3 individuals in *Rodriguez* PI hearings. I also regularly represent individuals in bond hearings pursuant to 8 U.S.C. 1226(a). Over the course of my career, I conservatively estimate that I have represented 30 individuals in Section 1226(a) hearings.

6. In my cases involving detained clients eligible for hearings under *Cases* or *Diouf II*, the Department of Homeland Security (DHS) did not provide written or verbal notice to the detainees that they were eligible for a *Casas/Diouf* hearing. Instead, once the detainees retained me, I had to affirmatively request such a hearing with the immigration court. I have not had any cases where DHS automatically scheduled *Casas/Diouf* hearings for eligible individuals.

7. In contrast, in my experience representing individuals eligible for *Rodriguez* preliminary injunction hearings, the government has mailed a written notice to me in advance of the hearing. However, in my experience, I have received such notices typically only one day before the hearing. I have found that this

period of notice is insufficient to adequately prepare for a bond hearing, because it can take several days to gather documents, interview potential witnesses, and conduct additional preparations for a bond hearing. In addition, I maintain a heavy caseload and cannot easily reschedule other meetings, hearings, and court deadlines to prepare for a bond hearing on such short notice.

8. Attached hereto as Exhibit A are true and correct examples of two hearing notices for *Rodriguez* preliminary injunction bond hearings pertaining to my clients. One of the notices is postmarked November 6, 2012, yet noticed a bond hearing set for November 8, 2012. The notice was not received by my office until November 7, 2012. The second notice is postmarked October 29, 2012, yet noticed a bond hearing set for October 31, 2012. That notice was not received by my office until October 30, 2012. Based on past experience, I typically receive notices and other documents mailed by the Los Angeles Immigration Court within one to three days after the date on which they are postmarked.

9. I am familiar with immigration court proceedings at the Los Angeles Immigration Court and (prior to its closing) the Mira Loma Immigration Court. In my experience in my own matters, and based on observing other matters, *Casas/Diouf* and *Rodriguez* preliminary injunction hearings typically last approximately 10 minutes, and no more than approximately 15 minutes.

10. In addition, based on my experience representing clients and seeing other cases that occurred before

or after mine in court, *Casas/Diouf* and *Rodriguez* preliminary injunction hearings routinely are conducted by video for detainees held in the following immigration detention facilities: Adelanto Detention Center, Theo Lacy Facility, and James A. Musick Facility. When a bond hearing is conducted by video, the hearing takes place at the Los Angeles Immigration Court, where the immigration judge, the DHS attorney, and (if represented) the detainee's attorney are physically present. The detainee appears by video from the detention center and is not transported to Los Angeles. In general, based on my experience and observations, bond hearings conducted by video do not materially differ in length from bond hearings in which the detainee is physically present.

11. Based on my experiences working with detained and released immigrants, immigrants released from detention are better able to obtain legal representation. In addition, immigrants released from detention are better able to assist with preparing applications for relief, defenses to removal, and, in general, gathering evidence and witnesses. For non-detained clients, I do not have to travel long distances to meet with clients at detention centers, nor do I have to worry that my visits might be delayed or cut short by "counts", meal-times, or "lockdowns."

12. Detention also presents serious impediments to my ability to communicate with my clients and advocate on their behalf at immigration court hearings. For hearings in which the detainee is physically present, the detainee must be transported to the Los Angeles Immigration Court. Because the detention centers are located some distance from the Los Ange-

les Immigration Court, detainees with hearings on the morning calendars often are forced to wake up very early in the morning (as early as 3 AM) to be transported to Los Angeles. In my experience, my clients are often exhausted during their hearings due to the early wakeup and long transport to the Los Angeles Immigration Court. In the courtroom, the detainees are handcuffed and shackled at their ankles until an individual detainee's case is called, at which point an ICE official will uncuff the detainee and allow him or her to sit at the counsel table during their hearing. After the hearing is completed, the detainee is cuffed again. My clients often tell me that they find the shackles painful and humiliating.

13. For detained clients that appear by video, there are different challenges. First, it is very difficult to have confidential attorney-client communications during a hearing by video, whereas when the client is in court an attorney can lean over and discreetly speak with a client. Second, if documentary evidence is in the detainee's possession, the detainee must submit the documents through the court fax system. The same is true for documents in DHS' possession which need to be reviewed by the detainee. I have observed that this system does not always function well, particularly for lengthy documents.

14. Currently, my office has approximately 23 cases—both detained and non-detained—pending before various judges at the Los Angeles Immigration Court. In the months since the preliminary injunction order was issued in *Rodriguez*, I have not observed any noticeable increase in the time it takes for a matter to be scheduled for a bond or other types of

hearings, or in the length of continuances, for my cases at the Los Angeles Immigration Court.

15. In a *Casas/Diouf* or *Rodriguez* PI hearing, as well as bond hearings under Section 1226(a), I typically present substantial documentary and testimonial evidence relevant to whether my client is a danger or a flight risk. For example, such evidence may include testimony from family members and other members' of the community affected by my client's detention; documents regarding past employment, participation and completion of substance abuse programs, or attendance and involvement in religious activities; and documents regarding the client's applications for relief and case history. In my experience, it can take a substantial period of time (at minimum, several days) to research, gather, and prepare such evidence for a bond hearing. In my experience, such evidence can be critically important to establishing a client's fitness for release and to obtaining a reasonable bond amount.

I declare under penalty of perjury of the laws of the State of California and the United States that the foregoing is true and correct to the best of my knowledge and belief. Executed this 7th day of Feb., 2013 in Los Angeles, California.

/s/ STACY TOLCHIN
STACY TOLCHIN

Exhibit A

IMMIGRATION COURT
300 NO LOS ANGELES ST. RM 4330
LOS ANGELES, CA 90012

LAW OFFICES OF STACY TOLCHIN
STACY TOLCHIN, ESQ.
634 S. SPRING ST., SUITE 714
LOS ANGELES, CA 90014

FILE: A090-083-757

RE: LOPEZ CASTENEDA, GILBERTO

NOTICE OF CUSTODY REDETERMINATION HEARING IN IMMIGRATION PROCEEDINGS

PLEASE TAKE NOTE THAT THE ABOVE CAPTIONED CASE HAS BEEN SCHEDULED/ RESCHEDULED FOR A CUSTODY REDERTERMINATION HEARING BEFORE THE IMMIGRATION COURT ON Nov 8, 2012 AT 08:00 A.M. AT THE FOLLOWING ADDRESS

300 NO LOS ANGELES ST. RM 8549
LOS ANGELES, CA 90012

YOU MAY BE REPRESENTED IN THIS PROCEEDING, AT NO EXPENSE TO THE GOVERNMENT, BY AN ATTORNEY OR OTHER INDIVIDUAL AUTHORIZED AND QUALIFIED TO REPRESENT PERSONS BEFORE AN IMMIGRATION COURT. IF YOU WISH TO BE REPRESENTED, YOUR ATTORNEY OR REPRESENTATIVE SHOULD APPEAR WITH YOU AT THE HEARING.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
606 SOUTH OLIVE ST.
LOS ANGELES, CA 90014

LAW OFFICES OF STACY TOLCHIN
STACY TOLCHIN, ESQ.
634 S. SPRING ST., SUITE 714
LOS ANGELES, CA 90014

IN THE MATTER OF VAN BREUKELEN, JOHANNES

FILE A 011-482-946 DATE: Oct 29, 2012

___ UNABLE TO FORWARD – NO ADDRESS PROVIDED

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO:

BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
P.O. BOX 8530

FALLS CHURCH, VA 22041

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECSION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
606 SOUTH OLIVE ST.
LOS ANGELES, CA 90014

✓ OTHER: SEE ATTACHED COPY OF "ORDER FOR HEARING" OF THE IMMIGRATOIN JUDGE.

[ILLEGIBLE]
COURT CLERK
IMMIGRATION COURT

CC: NGUYEN, TRACY, ESQ.
606 S. OLIVE ST., 8th FLOOR
LOS ANGELES, CA, 90014

Deposition of Wesley J. Lee (excerpts)

[114]

MR. ATKINSON: Object to the form of the question.

THE WITNESS: It could be. It could be considered.

BY MR. ARULANANTHAM:

Q. Is it something that's considered regularly?

MR. ATKINSON: Object to the form.

THE WITNESS: I would say that most asylum cases that we release on parole are done without any kind of alternative detention.

MR. ATKINSON: And I just want to make it clear on the record that Mr. Saldana has also been designated for discussion of the topic of alternatives to detention. So—

BY MR. ARULANANTHAM:

Q. I'm going to show you what we'll mark as Exhibit No.—what number are we?

MR. ATKINSON: Six, I believe.

MR. ARULANANTHAM: Six. (Exhibit 6 was marked for identification.)

BY MR. ARULANANTHAM:

Q. If you look at page—the third page of this—well, sorry. Tell me what this document is.

A. It's a policy on parole of aliens—of arriving aliens found to have a credible fear of [115] persecution or torture.

Q. This is one of the documents that you reviewed prior to this deposition; right?

A. I definitely read this document.

Q. I mean to get ready for this deposition, is this one of the documents you reviewed?

A. I haven't reviewed this in a while.

Q. On Page 3, which is also labeled ICE23 at the bottom, at the bottom paragraph, 6.3 it's numbered, it says, "DRO shall maintain national and local statistics on parole determinations and have a quality assurance process in place to monitor parole decision-making." Do you know if those statistics are kept?

A. Yes, they are kept.

Q. What are those statistics on?

A. I'm not sure what you're saying.

Q. What are they measuring? What are they keeping track of?

MR. ATKINSON: Object to form.

THE WITNESS: I'm not really sure what headquarters is tracking for, but the field offices are required to forward them to headquarters .

BY MR. ARULANANTHAM:

Q. What are you forwarding to them?

* * * * *

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Q. Is the flight risk standard that you apply in parole decisions different than the flight risk standard that you apply with respect to other custody determination processes?

MR. ATKINSON: Object to the form.

You can answer.

THE WITNESS: Only on the parole? I would say yes.

BY MR. ARULANANTHAM:

Q. How is it different?

A. Our parole policy is very liberal now. So if—pretty much if the—after a determination of credible fear they can provide a sponsor, an address to go to, that's going to satisfy the flight risk.

Q. Whereas more would be required for 236(a) determination?

A. It would.

Q. Is the danger standard that you apply in parole cases different than the danger standard that you apply in other cases, in other custody determination processes?

MR. ATKINSON: Object to the form. You can answer.

THE WITNESS: I would say it is just because

* * * * *

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MR. ATKINSON: Object to the form.

You can answer.

THE WITNESS: Deportation officer, in my opinion, would be a reviewer and a recommender.

BY MR. ARULANANTHAM:

Q. I meant the supervisory review, the levels above that.

MR. ATKINSON: Object to the form.

THE WITNESS: They could.

BY MR. ARULANANTHAM:

Q. Does it happen?

MR. ATKINSON: Object to the form.

THE WITNESS: I don't know. I don't know if every reviewer has not interviewed somebody.

BY MR. ARULANANTHAM:

Q. Is it the practice of the ICE agents who are doing the reviews, not the initial—the initial recommender but the reviewer—is it the practice of them to interview the detainees?

A. It's not practice.

Q. Have you ever seen it?

A. Some of the supervisors might have interviewed the detainee. I couldn't tell you really.

Q. So the—staying on the policy for a minute, let's look at Exhibit 6, Page ICE23, Paragraph 6.2.

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Looking at the line it says—starts in the second line: When an arriving alien found to have a credible fear establishes to the satisfaction of DRO his or her identity and that he or she presents neither a flight risk or danger to the community, DRO should, absent additional factors described in Paragraph 8.3 parole the alien.

A. Yes.

Q. What is your understanding of the phrase "to the satisfaction of"? Is that a like legal standard? Or what does that phrase mean to you?

MR. ATKINSON: Object to the form.

THE WITNESS: What does the phrase mean to me? It means that if they can show their identity and it's reasonable and they have a sponsor that make them not a flight risk, they have no criminal history that we know of to make them ineligible for release or danger to the community, they would be released.

BY MR. ARULANANTHAM:

Q. Is it—go back a second. Have you been—have you been trained at any point on the difference between preponderance of the evidence or clear and convincing evidence or burdens of proof? Is that something that ever came up in your training on custody determinations at any point?

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A. On custody determinations I would say no.

Q. Did it come up in any training?

A. In just law, immigration law? Sure.

Q. Do you understand "to the satisfaction of" to be like a standard like that or no?

MR. ATKINSON: Object to the form.

THE WITNESS: This parole policy is very liberal to the arriving alien.

BY MR. ARULANANTHAM:

Q. Right, you said that.

A. So it is—if they can show that they're not lying —if we can't demonstrate why we think they're lying or if they have a sponsor where they're going to go when they're going to be released so they don't become a flight risk, if we don't have any information on their criminal history, they are going to be released. Very liberal policy.

Q. Are there databases that ICE uses at the field office level to record statistics on parole?

MR. ATKINSON: Object to the form of the question, outside the scope of the 30(b)(6) topics.

You can answer.

THE WITNESS: We do have a database, ICE does, and information is put in that database. I do not think there is any way to pull a statistic out of

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that database. That's why we send the forms up to headquarters.

BY MR. ARULANANTHAM:

Q. Do you know the name of that database?

A. The ENFORCE System. Then there's a couple modules off of that. It's EARM and the detention module. But it's basically ENFORCE.

Q. Then those statistics you're referring to are not limited to parole decisions, it's other statistics also that are in those databases?

MR. ATKINSON: Object to the form of the question and object to the question to the extent it exceeds the topics of 30(b)(6) deposition.

You can answer.

THE WITNESS: Information on an alien that's going through proceedings—information on that case is going to be in that system.

MR. ARULANANTHAM: Let me take one second.

Q. What statistics about parole decisions get entered that database?

MR. ATKINSON: Object to the form of the question. Outside the scope of the 30(b)(6) deposition.

You can answer.

THE WITNESS: You mean what decision?

Parties' Stipulation as to Cost Discovery (excerpts)

One of the disputes that the parties have resolved is a dispute over certain several requests regarding the costs of detention and the costs of providing bond hearings. Petitioners sought that information on the ground that the "costs" may be relevant to the due process analysis established in *Mathews v. Eldridge*, 424 U.S. 319 (1976), which Petitioners contend may apply to this case. In *Mathews*, the Supreme Court set forth a balancing test for determining, in a case raising procedural due process challenges to administrative procedures, what administrative procedures are required when there has been a deprivation of liberty and due process is required. Under the *Mathews* due process analysis, the Court considers, among other things, the Government's interest, including "the fiscal . . . burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

Petitioners propounded requests for documents and interrogatories identifying detailed breakdowns of the costs of detaining aliens under the challenged immigration detention statutes and detailed breakdowns of the costs of providing bond hearings and other proceedings before immigration judges. Respondents objected that such cost discovery was irrelevant in light of the fact that the Government did not intend to raise the fiscal burdens as a defense to this action. During the parties' negotiations, Petitioners agree not to compel responses to the requests pertaining to "costs" if Respondents agreed not to purse a general defense at any stage of this litigation, including on appeal, as to the "fiscal burdens" of providing bond hearings.

To that end, the parties stipulate as follows:

1. Respondents represent and the parties stipulate that, except as described in paragraphs 3 and 4, they will not argue or otherwise pursue a general defense in this litigation on the grounds that (1) that the cost of providing a bond hearing should be considered in this case as a factor weighing in favor of Respondents, or (2) that the cost of providing bond hearings to class members (were Petitioners granted the relief they seek) would be greater that the cost of detaining class members. This stipulation * * *

Supreme Court, U.S.
FILED
AUG 26 2016
OFFICE OF THE CLERK

No. 15-1204

In the Supreme Court of the United States

DAVID JENNINGS, ET AL., PETITIONERS

v.

ALEJANDRO RODRIGUEZ, ET AL.,
INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

Under 8 U.S.C. 1225(b), inadmissible aliens who arrive at our Nation's borders must be detained, without a bond hearing, during proceedings to remove them from the country. Under 8 U.S.C. 1226(c), certain criminal and terrorist aliens must be detained, without a bond hearing, during removal proceedings. Under 8 U.S.C. 1226(a), other aliens may be released on bond during their removal proceedings, if the alien demonstrates that he is not a flight risk or a danger to the community. 8 C.F.R. 236.1(c)(8). Aliens detained under Section 1226(a) may receive additional bond hearings if circumstances have changed materially. 8 C.F.R. 1003.19(e). The questions presented are:

1. Whether aliens seeking admission to the United States who are subject to mandatory detention under Section 1225(b) must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months.

2. Whether criminal or terrorist aliens who are subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months.

3. Whether, in bond hearings for aliens detained for six months under Sections 1225(b), 1226(c), or 1226(a), the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community; whether the length of the alien's detention must be weighed in favor of release; and whether new bond hearings must be afforded automatically every six months.

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In the Supreme Court of the United States

No. 15-1204

DAVID JENNINGS, ET AL., PETITIONERS

v.

ALEJANDRO RODRIGUEZ, ET AL.,
INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-59a) is reported at 804 F.3d 1060. An opinion affirming a preliminary injunction (Pet. App. 60a-100a) is reported at 715 F.3d 1127. An opinion reversing the denial of class certification (Pet. App. 101a-138a) is reported at 591 F.3d 1105. The permanent injunction order of the district court (Pet. App. 139a-148a) is not published in the *Federal Supplement* but is available at 2013 WL 5229795.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 2015. On January 21, 2016, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including February 25, 2016. On February 16, 2016, Justice Kenne-

dy further extended the time to March 26, 2016, and the petition was filed on March 25, 2016. The petition for a writ of certiorari was granted on June 20, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

A. Detention Of Aliens Seeking Admission Into The United States

The Secretary of Homeland Security is responsible for "[s]ecuring the borders," enforcing the immigration laws, and "control[ling] and guard[ing] the boundaries and borders of the United States against the illegal entry of aliens." 6 U.S.C. 202(2) and (3); 8 U.S.C. 1103(a)(5).[1] The longstanding rule is that aliens who arrive at our Nation's doorstep seeking admission, but who are "not clearly and beyond a doubt entitled" to be admitted, "shall be detained" pending the outcome of proceedings before an immigration judge to determine whether the alien should be removed from the country. 8 U.S.C. 1225(b)(2)(A); see Immigration and Nationality Act (INA), ch. 477, Tit. II, § 235(b), 66 Stat. 199 (similar); Immigration Act of 1917 (1917 Act), ch. 29, § 16, 39 Stat. 886 (similar). Immigration judges are administrative judges in the Executive Office for Immigration Review (EOIR) in the Department of Justice. 8 C.F.R. 1001.1(*l*).

Congress has provided one potential avenue for release of an alien detained under Section 1225(b): The Secretary, "in his discretion" and on a "case-by-case basis for urgent humanitarian reasons or significant

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[1] Congress transferred to the Secretary the immigration enforcement functions formerly vested in the Commissioner of Immigration and Naturalization. *E.g.*, 6 U.S.C. 202(3), 557.

public benefit," may parole any alien "into the United States temporarily under such conditions as he may prescribe." 8 U.S.C. 1182(d)(5)(A). "[W]hen parole is not granted, the noncitizen is detained during the pendency of the inquiry" into whether he should be removed. 5 Charles Gordon et al., *Immigration Law and Procedure* § 61.05[2], at 61-28 (2016). Accordingly, an immigration judge "may not" conduct a bond hearing to determine whether an arriving alien should be released into the United States during removal proceedings. 8 C.F.R. 1003.19(h)(2)(i)(B).

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Tit. III, § 302(a), 110 Stat. 3009-579, Congress amended Section 1225(b) to add "expedited removal" procedures to "streamline[] rules and procedures * * * to make it easier to deny admission to inadmissible aliens," while ensuring that there is "no danger that an alien with a genuine asylum claim will be returned to persecution." H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 157-158 (1996) (House Report). Section 1225(b) now provides that, if a Department of Homeland Security (DHS) immigration officer determines that an alien "who is arriving in the United States" lacks valid documents or is inadmissible due to fraud, the officer "shall order the alien removed from the United States without further hearing." 8 U.S.C. 1225(b)(1)(A)(i); see 8 U.S.C. 1182(a)(6)(C) and (7).[2] If the alien indicates an intention to apply for asylum or expresses a fear of persecution or torture, a DHS

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[2] IIRIRA also authorized the Secretary to designate for expedited removal "certain other aliens" who crossed the border two years or less before being detained. 8 U.S.C. 1225(b)(1)(A)(iii). See note 5, *infra*.

asylum officer determines whether the alien has a credible fear. 8 U.S.C. 1225(b)(1)(A)(ii) and (B); 8 C.F.R. 208.30, 235.3(b)(4). The alien "shall be detained pending a final determination of credible fear of persecution." 8 U.S.C. 1225(b)(1)(B)(iii)(IV). If such an alien is found to lack (or never asserts) a credible fear, he "shall be detained" until removed. *Ibid.* If he has a credible fear, he "shall be detained for further consideration of the application for asylum" by an immigration judge. 8 U.S.C. 1225(b)(1)(B)(ii).

As noted, the Secretary has discretion to parole inadmissible aliens into the United States. 8 U.S.C. 1182(d)(5). For aliens detained under Section 1225(b), including those lacking proper documentation who have established a credible fear, regulations provide that DHS may grant parole if the alien is "neither a security risk nor a risk of absconding" and (1) has a serious medical condition; (2) is pregnant; (3) falls within certain categories of juveniles; (4) will be a witness; or (5) if continued detention is otherwise "not in the public interest." 8 C.F.R. 212.5(b); see 8 C.F.R. 235.3(c). Under agency guidance, such aliens who establish a credible fear are automatically considered for parole, and are ordinarily released if they provide sufficient evidence of their identity and show they will not be a flight risk or danger. J.A. 48-49.

B. Detention During Proceedings To Remove Aliens Already Inside The United States

1. A different framework exists for the detention and removal of aliens who are already inside the United States. The longstanding general rule is that "an alien may be arrested and detained," on issuance of a warrant, "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. 1226(a);

see INA § 242(a), 66 Stat. 208; 1917 Act §§ 19-20, 39 Stat. 889-891. "[P]ending such decision," the Secretary "may continue to detain the arrested alien" or "may release" the alien on bond or conditional parole, also known as release on recognizance. 8 U.S.C. 1226(a)(1) and (2); see INA § 242(a), 66 Stat. 208-209 (same); 1917 Act §§ 19-20, 39 Stat. 889-891 (similar).[3] The INA thus "does not grant bail as a matter of right." *Carlson* v. *Landon*, 342 U.S. 524, 540 (1952).

Implementing regulations provide that an immigration officer "may" release an alien detained under Section 1226(a) on bond if "the alien * * * demonstrate[s] to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding." 8 C.F.R. 236.1(c)(8); see 62 Fed. Reg. 10,360 (Mar. 6, 1997). An alien who is denied bond (or who believes it was set too high) may, "at any time" during removal proceedings, ask an immigration judge for a redetermination of the officer's decision. *Reno* v. *Flores*, 507 U.S. 292, 309 (1993); see 8 C.F.R. 236.1(d)(1), 1236.1(d)(1). "The burden is on the alien to show to the satisfaction of the Immigration Judge that he or she merits release on bond." *In re Guerra*, 24 I. & N. Dec. 37, 40 (B.I.A. 2006); see *In re Adeniji*, 22 I. & N. Dec. 1102, 1111-1113 (B.I.A. 1999); see also *Guerra*, 24 I. & N. Dec. at 40 (identifying factors relevant to bail risk).

The alien may appeal the immigration judge's custody determination to the Board of Immigration Appeals (BIA). 8 C.F.R. 236.1(d)(3)(i), 1236.1(d)(3)(i). And an alien may, at any time, ask an immigration judge to redetermine bond again if "circumstances have

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[3] For simplicity, this brief uses "bond" to encompass both bond and recognizance.

changed materially since the prior bond redetermination." 8 C.F.R. 1003.19(e); see *In re Chew*, 18 I. & N. Dec. 262, 263 n.2 (B.I.A. 1982) (similar).

2. In IIRIRA, Congress enacted 8 U.S.C. 1226(c) to prohibit the release of certain criminal aliens during their removal proceedings. Congress enacted that mandate "justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers." *Demore* v. *Kim*, 538 U.S. 510, 513 (2003).

Section 1226(c) consists of two paragraphs. Paragraph (1) directs that the Secretary "shall take into custody any alien" who is inadmissible to or deportable from the United States because he committed a specified crime or engaged in terrorist activities. 8 U.S.C. 1226(c)(1). For an alien who has not been admitted (*i.e.*, who entered illegally or was paroled), paragraph (1) applies if the alien committed a crime involving moral turpitude (unless that is his only conviction and the alien was a minor or the statutory maximum was a year or less and he was sentenced to six months or less); committed a controlled-substance offense; was sentenced to five or more years of imprisonment for multiple criminal convictions; engaged in controlled-substance trafficking; or committed an offense in certain uncommon categories. 8 U.S.C. 1226(c)(1)(A); see 8 U.S.C. 1182(a)(2). For an alien who was admitted, paragraph (1) applies if the alien committed an aggravated felony, a crime involving moral turpitude for which the alien was sentenced to a year or more of imprisonment, two or more crimes involving moral turpitude, a controlled-substance offense other than simple possession of 30 grams or less

of marijuana, a firearms offense, or an offense in certain uncommon categories, see 8 U.S.C. 1226(c)(1)(B) and (C), 1227(a)(2)(A)-(D), or if the alien has engaged in terrorist activities, see 8 U.S.C. 1226(c)(1)(D), 1227(a)(4)(B).

Paragraph (2) expressly prohibits the release of any alien detained under paragraph (1), with one narrow exception. It provides that the Secretary "may release" an alien detained under paragraph (1) "only if" the Secretary decides it is "necessary" for certain witness-protection purposes and "the alien satisfies the [Secretary]" that he "will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." 8 U.S.C. 1226(c)(2).

In *Demore*, this Court held that Section 1226(c) is constitutional on its face and upheld the mandatory detention, without bond, of a lawful permanent resident alien (LPR). 538 U.S. at 531. The respondent, Kim, had already been detained for "six months." *Ibid.* The Court explained that "[d]etention during removal proceedings is a constitutionally permissible part of that process." *Ibid.*

C. Detention Under A Final Order Of Removal

If an alien is ordered removed from the United States and there is no appeal or the BIA affirms, the order of removal becomes administratively final. 8 U.S.C. 1101(a)(47)(B). Detention authority then shifts to 8 U.S.C. 1231, which provides that DHS "shall remove the alien from the United States" within a "removal period" ordinarily of 90 days, and allows

detention of the alien during that period. 8 U.S.C. 1231(a)(1)(A), (C), and (2).[4]

If DHS does not remove an inadmissible or criminal alien within the removal period, it "may" continue to detain him or may release him on supervision. 8 U.S.C. 1231(a)(6). In *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), this Court interpreted Section 1231(a)(6) to authorize post-removal-period detention for a "reasonable" time, with six months being "presumptively reasonable" and detention remaining permissible unless "there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* at 700-701.

D. Procedural History

In May 2007, respondents initiated this habeas corpus class action on behalf of themselves and all other aliens in removal proceedings who have been detained by DHS in the Central District of California for six months or more. Pet. App. 4a. Respondents contended, among other things, that they are entitled to bond hearings before an immigration judge once they have been detained for six months. The district court declined to certify a class, but the Ninth Circuit reversed. *Ibid.*; see *id.* at 101a-138a.

On remand, the district court certified a class of all aliens within that district who are detained for "longer than six months" during removal proceedings, are not detained pursuant to a special national security detention statute, *e.g.*, 8 U.S.C. 1537, and have not been afforded a bond hearing. Pet. App. 5a-6a. The court divided the class into subclasses, corresponding to the

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[4] Some circuits, including the Ninth Circuit, have held that when an alien files a petition for review and obtains a stay of removal, detention authority reverts to Section 1226. See Pet. App. 50a-51a.

statutes under which class members are detained: Sections 1225(b), 1226(c), and 1226(a). *Ibid.*

The district court entered a preliminary injunction. Pet. App. 147a-148a. It required the government to provide bond hearings to aliens detained for six months under Section 1225(b), as well as criminal aliens detained for six months under Section 1226(c). *Ibid.* The Ninth Circuit affirmed. *Id.* at 6a, 60a-100a.

The district court then granted summary judgment to respondents and entered a permanent injunction. Pet. App. 139a-148a. The permanent injunction requires the government to provide any class member who is detained for six months or more with a bond hearing. *Id.* at 3a-4a, 144a. It further requires "[t]he government [to] prove by clear and convincing evidence that a detainee is a flight risk or a danger to the community to justify the denial of bond." *Id.* at 142a.

The court of appeals affirmed in part and reversed in part. Pet. App. 1a-59a. Applying the canon of constitutional avoidance, the court reasoned that "prolonged" detention under any of the relevant statutes would give rise to serious constitutional doubt, that Congress would have wanted to avoid these doubts by implicitly limiting detention without bond to a "reasonable time," and that detention becomes unreasonable "at the six-month mark." *Id.* at 13a (citations omitted); see *id.* at 32a-38a (discussing Section 1226(c)); *id.* at 39a-45a (Section 1225(b)); *id.* at 46a-48a (Section 1226(a)). The court did not attempt to square that interpretation with the text of the relevant statutes or regulations.

The court of appeals also revised the standards and procedures applicable in bond hearings. The court concluded that, in all bond hearings under the injunc-

tion, the alien is entitled to be released unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or danger to the community. Pet. App. 49a-50a. The court also held that immigration judges "must consider the length of time for which a noncitizen has already been detained." *Id.* at 56a. And the court held that "the government must provide periodic bond hearings every six months" to all class members, including aliens who already had a bond hearing under Section 1226(a) and had not requested another. *Id.* at 58a.

SUMMARY OF ARGUMENT

Unsatisfied with the current immigration detention system established by the political Branches, respondents seek a dramatic and wholesale revision of that system through court order. The court of appeals below accepted that invitation, replacing the long-standing legal regime with a radical new one in which aliens newly arriving at our borders or convicted of crimes have a presumptive entitlement to be released into the United States, if custody during removal proceedings lasts six months. The court held that arriving and criminal aliens must be given bond hearings before an immigration judge at that point, despite Congress's directions that they shall be detained, and the court held that such an alien is entitled to be released into the United States unless the *government* can establish through clear and convincing evidence that the alien is a flight risk or danger. The court then imposed a new factor for immigration judges to consider in bond hearings and required automatic bond hearings every six months, even when nothing else has changed since a prior hearing.

Each of these holdings is wrong, and the whole is worse than the sum of its parts. The court of appeals' revised immigration-detention scheme conflicts with the unambiguous text of controlling statutes and regulations. It conflicts with this Court's longstanding rule that the political Branches have plenary control over which aliens may physically enter the United States and under what circumstances. See *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). It conflicts with this Court's decision in *Demore* v. *Kim*, 538 U.S. 510 (2003), upholding the constitutionality of Section 1226(c)'s mandate that criminal aliens be detained, without bond, during removal proceedings. *Id.* at 531. It causes the very problems of recidivism and flight by criminal aliens that Congress enacted Section 1226(c) to prevent. And it creates an incentive for aliens to contest issues and prolong proceedings in order to be released.

We do not diminish the human consequences of detaining an alien during the proceedings the government has provided if he contests his removability, applies for relief from removal, or seeks appellate review. But the court of appeals seriously erred in using a supersized version of the canon of constitutional avoidance here.

These laws are clear: Congress has long provided that aliens seeking admission who are "not clearly and beyond a doubt entitled to be admitted" "shall" be detained, 8 U.S.C. 1225(b), and parole is the only exception. Longstanding regulations provide that immigration judges "may not" release arriving aliens on bond, 8 C.F.R. 1003.19(h)(2)(i)(B). The Secretary also "shall" take certain criminal aliens into custody, and may release them "only if" a narrow exception for

witness protection is satisfied. 8 U.S.C. 1226(c)(1) and (2). Those mandates are unambiguous, and the avoidance canon has no role to play.

The court of appeals' interpretation would also subvert the fundamental purpose of these statutes, which are clearly constitutional in the vast majority of their applications. The fundamental purpose of Section 1225(b) is to control the border as to aliens on the threshold of entry. The court nonetheless construed it to impose a six-month cap on detention without bond hearings of aliens arriving at our borders for the first time, in order to avoid a constitutional problem it believed could exist if the statute were applied to LPRs returning from abroad. But LPRs returning from abroad are ordinarily exempt from detention under that provision; *Mezei* establishes that an LPR who has not established his admissibility can be detained indefinitely after returning from an extended trip abroad; any such detention under Section 1225(b) has a definite end point, because it ends when removal proceedings end; and parole exists as a safeguard against undue detention. Doubtful applications of Section 1225(b) thus would be vanishingly rare and cannot remotely justify the court's sweeping revision of the statute, which is contrary to Congress's basic aim of controlling the border.

Doubtful applications of Section 1226(c) are also rare and likewise cannot justify invoking the avoidance canon to impose a six-month cap on mandatory detention of criminal aliens. Section 1226(c)'s text is crystal clear. In *Demore*, this Court affirmed the mandatory detention of a convicted criminal alien under Section 1226(c) for more than six months, and explained that constitutionality depends not simply on

the passage of time but on whether detention continues to serve its purpose of preventing flight and recidivism during removal proceedings. 538 U.S. at 529-531. The Court recognized that aliens' choices to seek continuances, relief from removal, or appeals require "difficult judgments," because they come at the cost of more time in detention, but that the difficulty of such choices does not make it unconstitutional for Congress to mandate continued detention during the time they may trigger. *Id.* at 530-531 & n.14. A detention of six months or even considerably longer thus does not itself cause a constitutional problem, as it may simply reflect the legitimate consequences of an alien's choices within a complex adjudicatory system that affords the alien extensive opportunities for relief and review. And releasing criminal aliens on bond would create the very opportunities for recidivism and flight that Congress enacted Section 1226(c) to prevent.

More fundamentally, the Secretary's plenary control of the border, and his detention of convicted criminals for the period necessary to complete their removal proceedings, are vital and intended features of this Nation's immigration law—not problems that Congress would have wanted to avoid. Congress enacted IIRIRA to streamline the Secretary's ability to remove newly arriving aliens and convicted criminals, and to prevent them from fleeing or committing crimes during their removal proceedings. That same Congress did not, sub silentio, hamstring those efforts by creating a presumptive entitlement for such aliens to be released into the United States after six months, nor did that Congress wish to provide an incentive for aliens to extend their proceedings to hit that cap.

To be faithful to the unambiguous judgments of Congress and the Secretary, Sections 1225(b) and 1226(c) must be enforced as written. An alien who believes his circumstances present a rare case in which his detention has become unconstitutional can bring an as-applied challenge to the statute under the Due Process Clause in an individual habeas corpus proceeding. That avenue protects individual constitutional rights without carving enormous loopholes into measures that are vital for effective control of the Nation's borders and enforcement of the immigration laws against criminal aliens.

Some may believe that the Ninth Circuit's vision of immigration detention is wiser or more humane, while others would disagree. But Congress weighed the interests in controlling the border, protecting the public from criminal aliens, affording individual aliens adequate protections and opportunities for relief and review, and minimizing the adverse foreign-relations impact of U.S. immigration law. The canon of constitutional avoidance is not a tool for courts to comprehensively rewrite those laws and strike a different balance.

ARGUMENT

This Court has "long recognized [that] the power to expel or exclude aliens [i]s a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)); see *Arizona* v. *United States*, 132 S. Ct. 2492, 2498 (2012). "[T]he Court's general reaffirmations of this principle have been legion." *Kleindienst* v. *Mandel*, 408 U.S. 753, 765-766 & n.6 (1972) (collecting

cases). This Court has also long recognized that "detention during deportation proceedings [i]s a constitutionally valid aspect of the deportation process." *Demore* v. *Kim*, 538 U.S. 510, 523 (2003). "[D]eportation proceedings 'would be in vain if those accused could not be held in custody pending the inquiry into their true character.'" *Ibid.* (quoting *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896)); see *Reno* v. *Flores*, 507 U.S. 292, 305-306 (1993).

The court of appeals' revision of the legal framework governing detention during removal proceedings fundamentally disregards these principles. And it is implausible that, to avoid rare constitutional problems that might arise from detaining an alien arriving at our borders or a criminal alien, the Congress that enacted IIRIRA would have preferred to give *all* arriving aliens and criminal aliens a presumptive entitlement to be released into the United States if detention lasts for six months. Rather, to be faithful to Congress's plan, the controlling provisions must be read to mean what they say, leaving any potentially difficult applications of those provisions to be resolved in as-applied constitutional challenges in individual habeas proceedings.

I. ALIENS DETAINED UNDER SECTION 1225(b) CANNOT BE RELEASED ON BOND BY AN IMMIGRATION JUDGE

Aliens seeking admission who are not "clearly and beyond a doubt entitled to be admitted" are statutorily prohibited from physically entering the United States and must be detained during removal proceedings, 8 U.S.C. 1225(b)(2)(A), unless the Secretary exercises his discretion to release them on parole, 8 U.S.C. 1182(d)(5). Congress has never permitted immigra-

tion judges to release such aliens on bond during removal proceedings—much less created a presumptive entitlement for arriving aliens to be released into the United States after six months unless the government can show (by clear and convincing evidence) that the alien is a danger or flight risk. There is no basis for that radical judicial revision of the legal regime that has protected our Nation's borders for a century.

A. Aliens Detained Under Section 1225(b) Can Only Be Released On Parole And Are Ineligible For A Bond Hearing

The controlling statutory and regulatory text leaves no room for the court of appeals' interpretation that aliens detained under Section 1225(b) may be released on bond by an immigration judge if detention lasts for six months. Congress foreclosed that result by providing that an alien seeking admission into the United States who is "not clearly and beyond a doubt entitled to be admitted * * * *shall be detained* for a proceeding" to determine whether the alien should be removed. 8 U.S.C. 1225(b)(2)(A) (emphasis added). Congress reiterated that directive in IIRIRA for aliens who appear to be inadmissible due to fraud or a lack of valid travel documentation and are subject to expedited removal. Any such alien "*shall*" be ordered removed "without further hearing" unless he claims a credible fear or intends to apply for asylum, in which case he "*shall be detained* pending a final determination of credible fear"; "if found not to have such a fear, until removed"; and if found to have a credible fear, he "*shall be detained* for further consideration of the application for asylum." 8 U.S.C. 1225(b)(1)(A)(i), (B)(ii), and (iii)(IV) (emphases added).

"Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement." *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969, 1977 (2016); see *Zadvydas* v. *Davis*, 533 U.S. 678, 697 (2001). And here, the repeated "shall be detained" clearly means what it says, because Congress said "may" when it meant "may." For example, the provision in *Zadvydas* states that the government "may" continue to detain an alien after expiration of the removal period. 8 U.S.C. 1231(a)(6). And Section 1226(a) provides that the Secretary generally "may" take an alien into custody and "may continue to detain the arrested alien" or "may release the alien" on bond. 8 U.S.C. 1226(a)(1) and (2)(A).

Congress crafted only one exception to the rule that, when there is doubt about admissibility, an alien seeking admission "shall" be detained during removal proceedings: In the same provision that defines which aliens are inadmissible, Congress provided that the Secretary "may" parole into the United States "any alien applying for admission," "on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. 1182(d)(5)(A); see 8 U.S.C. 1182(d)(5)(B) (standard for refugees). "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) (citation omitted).

There is no such contrary evidence here. Indeed, although IIRIRA replaced the term "entry" with the more precise terms "admitted" and "admission," the same fundamental substantive rule has been in place for a century. See INA §§ 212(d)(5), 235(b), 66 Stat.

188, 199; 1917 Act § 16, 39 Stat. 886; *Kaplan* v. *Tod*, 267 U.S. 228, 230-231 (1925) (parole under 1917 Act); *In re R-*, 3 I. & N. Dec. 45, 46 (B.I.A. 1947) (same).

Federal regulations have codified this longstanding rule: An immigration judge "may not" hold a bond hearing for "[a]rriving aliens in removal proceedings." 8 C.F.R. 1003.19(h)(2)(i)(B). The only mechanism for releasing such an alien is via the Secretary's discretionary parole authority. See 8 C.F.R. 235.3(b)(2)(iii) (alien in expedited removal proceedings with credible fear "shall be detained" during removal proceedings, "except that parole of such alien * * * may be permitted"). These regulations are not arbitrary or capricious, warrant full deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984), and foreclose the court of appeals' statutory interpretation.[5]

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[5] Respondents contend that the government "already provides bond hearings" to some aliens detained under Section 1225(b). Br. in Opp. 14 (citing *In re X-K-*, 23 I. & N. Dec. 731, 734-735 (B.I.A. 2005)). That is inaccurate. *X-K-* establishes that the aliens at issue there ("certain other aliens" who already crossed the border without inspection, were encountered within two weeks and 100 miles of that illegal entry, were subject to expedited removal pursuant to designation by the Secretary, and were found to have a credible fear) were detained under regulations implementing Section 1226(a), not Section 1225(b): Relying on a regulatory lacuna, the BIA ruled that those aliens may obtain bond under "the regulations allow[ing] Immigration Judges to exercise the general custody authority of section [1226]." 23 I. & N. Dec. at 734 (citing 8 C.F.R. 1003.19(h)(2), 1236.1(c)(11) and (d)). By contrast, federal regulations direct that an immigration judge "may not" conduct bond hearings for arriving aliens. 8 C.F.R. 1003.19(h)(2)(i)(B). And *X-K-* stated that "[t]here is no question that Immigration Judges lack jurisdiction over arriving aliens" in removal proceed-

B. The Statutory Background, Context, And Purpose Confirm That Release On Bond Is Not Permitted

1. The court of appeals' interpretation also is implausible in light of the statutory background, context, and purpose.

a. As explained above, Section 1225(b) is the most recent iteration of a statutory framework that, for a century, has provided for the exclusion of inadmissible aliens arriving at the Nation's borders. It is also built on a deep foundation of this Court's immigration jurisprudence. "[T]he power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo*, 430 U.S. at 792 (quoting *Mezei*, 345 U.S. at 210). And "[d]etention during removal proceedings is a constitutionally permissible part of that process." *Demore*, 538 U.S. at 531.

The authority of the political Branches is particularly strong—and countervailing constitutional interests are particularly faint—with respect to control of the Nation's borders as to aliens who stand "on the threshold of initial entry." *Mezei*, 345 U.S. at 212. For such aliens, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Ibid.* (quoting *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950)); see *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982) ("[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application.").

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ings. 23 I. & N. Dec. at 732. Respondents thus press a position *X-K-* itself described as unquestionably wrong.

In *Mezei*, for example, this Court upheld the indefinite detention of an LPR at the border for 21 months, without a hearing, as he sought to return to the United States after a nearly two-year trip abroad. 345 U.S. at 207-209. This Court rejected the proposition that his "continued exclusion deprives him of any statutory or constitutional right," *id.* at 215, and distinguished Mezei's "clear break" in "continuous residence" from an LPR's mere "temporary absence," where some kind of hearing may be required, *id.* at 213-214.

Mezei drew spirited dissents, but the Court was unanimous on the point that he could be held, without bond, during the period needed to effectuate his exclusion. See 345 U.S. at 222-223 (Jackson, J., dissenting) ("Due process does not invest any alien with a right to enter the United States, nor confer on those admitted the right to remain against the national will."). Rather, the dissenting Justices objected only to the government's decision, on national security grounds, not to provide Mezei notice of or opportunity to challenge the basis for his exclusion. See *id.* at 218 (Black, J., dissenting) ("Mezei should not be deprived of his liberty indefinitely except as the result of a fair open court hearing in which evidence is appraised by the court."); *id.* at 227 (Jackson, J., dissenting) ("[W]hen indefinite confinement becomes the means of enforcing exclusion, it seems to me that due process requires that the alien be informed of its grounds and have a fair chance to overcome them.").

Consistent with this unbroken legal tradition, Congress provided in IIRIRA that an inadmissible alien arriving in or seeking admission to the United States "shall be detained" during proceedings to remove the alien from the country. 8 U.S.C. 1225(b)(1)(B)(ii),

(iii)(IV), and (b)(2). An immigration judge therefore "may not" release such an alien on bond. 8 C.F.R. 1003.19(h)(2)(i)(B). Congress has instead vested the Secretary with sole authority, as a matter of discretion, to decide whether to release the alien on parole. 8 U.S.C. 1182(d)(5); see 8 C.F.R. 235.3(c). As a result, the Executive retains plenary and firm control over the border and physical entry of aliens into the interior. Unlike the situation that elicited dissents in *Mezei*, aliens detained under Section 1225(b)(2) (and aliens who were in expedited removal under Section 1225(b)(1) but were found to have a credible fear) are entitled to a full hearing before an immigration judge to contest removal. And unlike in *Mezei*, detention under Section 1225(b) has a "definite termination point," *Demore*, 538 U.S. at 529, because it ends when those removal proceedings end.

b. The injunction affirmed below flies in the face of this longstanding legal regime and this Court's precedents. The injunction gives aliens seeking admission who are "not clearly and beyond a doubt entitled to be admitted," 8 U.S.C. 1225(b)(2)(A), an entitlement nonetheless to be allowed into the United States, so long as detention lasts six months and *the Secretary* cannot prove, *by clear and convincing evidence*, that they are flight risks or dangers. The Congress that enacted IIRIRA never would have adopted such a regime. Congress enacted IIRIRA to strengthen—not weaken—the Secretary's ability to secure the borders. See House Report 106 ("The first step in asserting our national sovereignty and controlling illegal immigration is to secure our nation's land borders.").

The ruling below would often defeat the very purpose of detaining such aliens: to ensure that the bor-

der actually keeps people out and to ensure physical custody over the alien to effectuate that exclusion. See *Demore*, 538 U.S. at 523; cf. *Mezei*, 345 U.S. at 216 ("Ordinarily to admit an alien barred from entry on security grounds nullifies the very purpose of the exclusion proceeding."). Under the injunction below, however, those aliens could physically enter the United States—and potentially abscond and thereby thwart efforts to remove them—even when the Secretary concludes that they should be detained rather than paroled.

Experience also indicates that flight is a serious problem. For example, EOIR reports that, in fiscal year 2015, 11,325 of the 27,443 initial case completions by immigration judges for released aliens—41% of the total—were *in absentia* orders after the alien absconded. EOIR, *FY 2015 Statistics Yearbook*, P3 (Apr. 2016) (*2015 Yearbook*). There is no reason to believe that the aliens released under the court of appeals' rule would be less likely to flee.[6]

2. The court of appeals' interpretation of Section 1225(b) would also undermine the operation of numerous statutory provisions. See *Graham Cnty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 290 (2010) ("Courts have a 'duty to construe statutes, not isolated provisions.'") (citation omitted). The INA spells out in great detail how aliens can obtain visas or otherwise seek admission to the United States, *e.g.*, 8 U.S.C. 1154, and which aliens

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[6] The risk that aliens will abscond is also reflected in private markets for immigration bonds. See House Report 124 ("[B]onding companies are reluctant to underwrite the high risk of aliens failing to appear, and thus, aliens must put up the full amount of the bond.").

are inadmissible, 8 U.S.C. 1182(a). A rule of presumptive release after six months would render those exhaustive rules far less significant.

For example, Congress has defined which criminal offenses—subject to finely-tuned exceptions and waivers—make an alien inadmissible. See 8 U.S.C. 1182(a)(2). But the court of appeals' interpretation would make Congress's precision largely wasted effort in many cases after six months, if the government could not produce clear and convincing evidence of flight risk or danger. That is a particular problem for aliens newly arriving at our borders, about whom the government may know very little. Congress's general prohibition against admitting aliens without a visa or valid passport, 8 U.S.C. 1182(a)(7)(A) and (B), would similarly lose much of its force.

The court of appeals' interpretation also disregards Congress's longstanding interest in protecting American workers. Congress has generally prohibited aliens from being admitted as immigrants to perform skilled or unskilled labor when American workers are available to do the job, see 8 U.S.C. 1182(a)(5), and has prohibited the Secretary from authorizing aliens to lawfully work on the basis that they have been released on bond, 8 U.S.C. 1226(a)(3), 1324a(a). Under the Ninth Circuit's interpretation, however, it may be difficult for the government to establish that an economic migrant is a flight risk or a danger. And releasing such aliens on bond would likely force them to work off the books, rewarding the unscrupulous employers who hire them and distorting labor markets in precisely the ways Congress sought to prevent.

To be sure, the Secretary may release an alien on parole even when the alien is inadmissible under

Section 1182(a). But that is pursuant to express authorization in a latter subsection of the very same statute: 8 U.S.C. 1182(d)(5). That decision is made, as a matter of discretion, by the same official—the Secretary—Congress charged with guarding the borders. *Ibid.* And an alien released on parole may be authorized to work lawfully, 8 C.F.R. 274a.12(c)(11), thereby ameliorating the impact on American workers. Parole is thus properly the sole mechanism for releasing such aliens during removal proceedings, as the Secretary can weigh the full range of competing considerations.

3. The court of appeals' statutory interpretation is even more implausible in light of the incentives it would create for aliens to extend their removal proceedings in order to reach the six-month mark. "[C]ourt ordered release cannot help but encourage dilatory and obstructive tactics by aliens." *Demore*, 538 U.S. at 530 n.14 (brackets in original) (quoting *Zadvydas*, 533 U.S. at 713 (Kennedy, J., dissenting)); see *ibid.* (discussing evidence of aliens released on bond filing frivolous appeals to delay their removal). A Congress intent on "regaining control over our nation's borders," House Report 107, would not have countenanced a rule that would enable aliens to breach the borders so readily.

C. The Canon Of Constitutional Avoidance Does Not Justify Supplanting The Longstanding Legal Regime Governing Control Of The Border

To support its wholesale revision of Section 1225(b), the court of appeals relied solely on the canon of constitutional avoidance. Pet. App. 39a-45a. For numerous reasons, that canon cannot support the court of appeals' decision.

At the outset, the avoidance canon is "a tool for choosing between competing plausible interpretations of a provision"; "[i]t 'has no application' in the interpretation of an unambiguous statute." *McFadden* v. *United States*, 135 S. Ct. 2298, 2307 (2015) (quoting *Warger* v. *Shauers*, 135 S. Ct. 521, 529 (2014)). And it is "a means of giving effect to congressional intent, not of subverting it." *Clark* v. *Martinez*, 543 U.S. 371, 382 (2005); see *Salinas* v. *United States*, 522 U.S. 52, 60 (1997). As set forth above, the statutory and regulatory text cannot plausibly be read, particularly in context, to impose a categorical rule requiring arriving aliens to be allowed in the United States on bond if their detention lasts six months and the government is unable to prove that they are a flight risk or danger.

The court of appeals' rule also subverts Congress's purpose of strengthening control of the border and streamlining removal of aliens arriving at our borders. The court acknowledged that Section 1225(b) is clearly constitutional in "likely the vast majority" of its applications. Pet. App. 86a. *Mezei* and *Demore* establish that it is clearly constitutional in virtually of the rest. And an isolated case in which a potential constitutional problem might conceivably arise could be resolved by releasing the alien on parole or through an as-applied constitutional challenge in an individual habeas proceeding. The court's statutory interpretation is thus fundamentally wrong. The Secretary's plenary control over the border is a vital feature of the INA, not a serious constitutional problem that Congress would have wanted to avoid.

1. It is undisputed that "likely the vast majority" of Section 1225(b)'s applications involve the exclusion of aliens on the threshold of initial entry to the United

States. Pet. App. 86a. There is no doubt that Section 1225(b) is constitutional in that setting. See *Mezei*, 345 U.S. at 212. Indeed, Section 1225(b)'s core applications are at the epicenter of the government's inherent power over immigration.

Respondents point (Br. in Opp. 14-15) to the possibility that an LPR returning from abroad could be placed in removal proceedings and detained under Section 1225(b) for more than six months. But the mere fact that an LPR returning from abroad might be detained under Section 1225(b) does not raise constitutional doubts because Mezei himself was an LPR returning from a sufficiently extended trip abroad to be "assimilated to th[e] status" of an alien newly seeking entry, 345 U.S. at 214 (citation omitted), and he was detained indefinitely for 21 months, *id.* at 209. Moreover, the court of appeals identified no example in the record of returning LPRs who had ever been detained under Section 1225(b) for six months. Pet. App. 42a-43a. Respondents assert (Br. in Opp. 16) that there was one, but they do not assess whether the constitutionality of that detention was controlled by *Mezei*.[7] Regardless, the number of plainly valid applications dwarfs any potential for a constitutional problem.

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[7] Following the court of appeals' decision, there has been an uptick in habeas cases pressing a six-month cap on detention of a returning LPR as a matter of avoidance. *E.g.*, *Arias* v. *Aviles*, No. 15-cv-9249, 2016 WL 3906738, at *1 (S.D.N.Y. July 14, 2016) (applying the avoidance canon); *Perez* v. *Aviles*, No. 15-cv-5089, 2016 WL 3017399, at *3 (S.D.N.Y. May 24, 2016) (rejecting such a claim; "the length of Perez's detention has largely been due to his own appeals"); *Chen* v. *Shanahan*, No. 16-cv-00841 (S.D.N.Y. Apr. 5, 2016) (dismissed following release on parole). Such cases remain rare.

Most aliens coming to this country are not LPRs, and most LPRs cannot be detained under Section 1225(b). A verified LPR cannot be placed in expedited removal proceedings under Section 1225(b)(1) at all, 8 C.F.R. 235.3(b)(5)(ii), and LPRs are generally exempt from detention under Section 1225(b)(2). That provision applies only to an "applicant for admission," 8 U.S.C. 1225(b)(2)(A), and LPRs generally "shall not be regarded" as applicants for admission, 8 U.S.C. 1101(a)(13)(C). An LPR may be regarded as an applicant for admission only if the government proves, by clear and convincing evidence, that he has been outside the country for more than 180 continuous days; "abandoned or relinquished" his lawful status; "engaged in illegal activity after having departed the United States"; departed the country during removal proceedings; committed a criminal offense that makes him inadmissible under 8 U.S.C. 1182(a)(2); or attempted to enter outside a designated port of entry. 8 U.S.C. 1101(a)(13)(C); see *In re Rivens*, 25 I. & N. Dec. 623, 624-625 (B.I.A. 2011).

Congress enacted those exceptions in light of this Court's jurisprudence, and its judgment that an LPR in these narrow circumstances should be assimilated to the status of a new entrant, *Mezei*, 345 U.S. at 214, warrants great deference and will virtually always be clearly constitutional. There is no constitutional problem with treating an LPR as a new arrival if he has been continuously outside the country for more than 180 days, 8 U.S.C. 1101(a)(13)(C)(ii); see *Mezei*, 345 U.S. at 213-214 (distinguishing between a "temporary absence" and a "clear break" in continuous residence); see also *Plasencia*, 459 U.S. at 32-34 (same). Congress also treats a returning LPR as a new arrival if he has

committed a crime that triggers inadmissibility under Section 1182(a)(2). 8 U.S.C. 1101(a)(13)(C)(v). But such convictions also trigger mandatory detention under Section 1226(c), which this Court upheld in a case involving an LPR detained for more than six months. *Demore*, 538 U.S. at 531.[8] And there is no plausible constitutional problem with treating an LPR as a new arrival if he "abandoned or relinquished" his lawful status, fled during removal proceedings, or attempted to sneak into the United States. 8 U.S.C. 1101(a)(13)(C)(i), (iv), and (vi).

LPRs also have a panoply of protections against the consequences of being treated as new arrivals under Section 1101(a)(13)(C). They have advance notice of that provision and can readily avoid such treatment, including by not leaving the country for more than six months or not committing crimes that trigger inadmissibility under Section 1182(a)(2). See *Vartelas* v. *Holder*, 132 S. Ct. 1479, 1484-1487 (2012). The Secretary may release the alien on parole. 8 U.S.C. 1182(d)(5). Indeed, under U.S. Immigration and Customs Enforcement (ICE) policy, a returning LPR placed in removal proceedings as an applicant for admission is automatically considered for parole and will ordinarily be released unless he has not established his identity or has committed an offense that also warrants mandatory detention under Section 1226(c). See J.A. 48-49. And any LPR detained under Section 1225(b) is in full removal proceedings before

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[8] Treating a returning LPR as a new arrival would be similarly constitutional under *Demore* if the LPR sought to return after committing a similar offense abroad. See 8 U.S.C. 1101(a)(13)(C)(iii).

an immigration judge and thus has the procedural protections the *Mezei* dissenters viewed as sufficient.

In sum, Section 1225(b) is plainly constitutional as applied to aliens on the threshold of initial entry, which constitutes "likely the vast majority" of its applications; returning LPRs are always exempt from detention under Section 1225(b)(1) and almost always exempt under Section 1225(b)(2); and even when a returning LPR is treated as a new arrival under Section 1101(a)(13)(C), that treatment will often be plainly constitutional under *Mezei* or *Demore*, and will always be accompanied by extensive protections. Section 1225(b) is thus clearly constitutional in virtually all of its applications.

2. Interpreting Section 1225(b) to give *every* arriving alien a bond hearing after six months of detention not only would carve a gaping hole in the legal regime protecting our Nation's borders, but also is completely misdirected for protecting the rights of returning LPRs. Any LPR who is treated as an applicant for admission under Section 1101(a)(13)(C), and thereby detained under Section 1225(b) in circumstances he alleges are unconstitutional, could file a habeas petition raising an as-applied challenge under the Due Process Clause to the application of *Section 1101(a)(13)(C)*, and the district court could take into account all the circumstances of that unusual case. There is no basis to impose a cap on Section 1225(b) itself as a matter of statutory construction, when the overwhelming majority of aliens are clearly properly detained under that provision.[9]

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[9] In the alternative, if the treatment of a particular LPR as an arriving alien under 8 U.S.C. 1101(a)(13)(C) gave rise to a difficult constitutional question, a court could conceivably construe it not to

II. SECTION 1226(c) DOES NOT PERMIT CRIMINAL ALIENS TO BE RELEASED ON BOND

The court of appeals similarly erred in relying on the canon of constitutional avoidance to interpret Section 1226(c) to give criminal aliens a presumptive entitlement to be released on bond after six months. The text unambiguously forecloses that interpretation. A six-month cap on mandatory detention is also contrary to this Court's decisions in *Demore* and *Zadvydas*, and would cause the very harms Congress enacted Section 1226(c) to prevent.

A. Section 1226(c) Unambiguously Prohibits Release Of Criminal Aliens On Bond

The statutory text unambiguously prohibits the release of criminal aliens detained under Section 1226(c) on bond. Section 1226(c) provides that the Secretary "shall take into custody" the specified criminal aliens, and "may release" such an alien "*only if*" the Secretary decides it is "necessary" for certain witness-protection purposes and "the alien satisfies the [Secretary]" that he "will not pose a danger to the safety of other persons or of property and is likely to appear

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mandate such treatment. Congress has provided that an LPR "*shall not be regarded* as seeking an admission" unless an exception applies, *ibid.* (emphasis added), but did not expressly state that all LPRs shall "be regarded" as seeking an admission. A court thus could conceivably interpret that provision to permit DHS to cease "regard[ing]" a returning LPR as seeking admission—and thus to no longer be covered by Section 1225(b)(2). Concededly, that is an unnatural reading of Section 1101(a)(C)(13), and the government does not urge it here. But it is more focused and plausible than the court of appeals' sweeping revision of Section 1225(b), and would do far less violence to the scheme as a whole. Concerns about detaining LPRs also provide no basis for narrowing Section 1225(b)(1), which does not even apply to LPRs.

for any scheduled proceeding." 8 U.S.C. 1226(c) (emphasis added). Congress's direction that such aliens "shall" be taken into custody and may be released "only if" a single express exception is satisfied obviously means that release is prohibited when that exception is not satisfied: It is the "only" exception.

Section 1226(a) reinforces the point. Subsection (a) provides that "[e]xcept as provided in subsection (c)," the Secretary "may release [an] alien" on bond. 8 U.S.C. 1226(a)(2)(A). The Secretary's statutory authority to release an alien on bond thus does not extend to aliens detained under Subsection (c), "[e]xcept" when the witness-protection exception "provided in subsection (c)" is satisfied. *Ibid.* Controlling regulations say the same thing: "[N]o alien described in [Section 1226(c)(1)] may be released from custody during removal proceedings except pursuant to" the witness-protection exception in Section 1226(c)(2). 8 C.F.R. 236.1(c), 1236.1(c). An immigration judge "may not" provide a bond hearing for "[a]liens in removal proceedings subject to [Section 1226(c)(1)]." 8 C.F.R. 1003.19(h)(2)(i)(D).

The canon of constitutional avoidance thus does not apply. "[I]f 'Congress has made its intent' in the statute 'clear, we must give effect to that intent.'" *Zadvydas*, 533 U.S. at 696 (quoting *Miller* v. *French*, 530 U.S. 327, 336 (2000)). In Section 1226(c), Congress has been crystal clear. Indeed, *Zadvydas* itself contrasted the permissive provision at issue there to Section 1226(c), which it emphasized "*require[s]* detention of criminal aliens during removal proceedings." *Id.* at 697. That requirement ends the statutory inquiry. Any doubts about applications of Section 1226(c) accordingly must be resolved in an individual

as-applied constitutional challenge, not a class-action lawsuit.

B. Releasing Criminal Aliens On Bond Would Cause The Very Harms Congress Enacted Section 1226(c) To Prevent

Section 1226(c)'s context and purpose further weigh against construing it to allow covered criminal aliens to be released on bond at any time, much less after six months.

1. Congress beginning in the late 1980s incrementally amended the INA to constrain the Executive's discretion to release criminal aliens on bond. See *Demore*, 538 U.S. at 520-521. Nonetheless, criminal aliens continued to reoffend and flee at alarming rates, giving rise to a "serious and growing threat to public safety." S. Rep. No. 48, 104th Cong., 1st Sess. 1 (1995). One study showed that, "after criminal aliens were identified as deportable, 77% were arrested at least once more and 45%—nearly half—were arrested multiple times before their deportation proceedings even began." *Demore*, 538 U.S. at 518. And after release on bond, "more than 20% of deportable criminal aliens failed to appear for their removal hearings." *Id.* at 519; see *id.* at 520 (discussing subsequent study finding that "one out of four criminal aliens released on bond absconded prior to the completion of his removal proceedings").

In response to this "wholesale failure by the [Immigration and Naturalization Service (INS)] to deal with increasing rates of criminal activity by aliens," Congress enacted Section 1226(c) in IIRIRA. *Demore*, 538 U.S. at 518. Section 1226(c) embodies Congress's categorical judgment that aliens who have committed the specified offenses pose an undue flight

risk and danger to the community—and that individual DHS agents and immigration judges should no longer be in the business of trying to predict whether they will be a flight risk or danger. See *Reid* v. *Donelan*, 819 F.3d 486, 497 (1st Cir. 2016) ("[T]he animating force behind § 1226(c) is its categorical and mandatory treatment of a certain class of criminal aliens."). In *Demore*, this Court held that "[t]he evidence Congress had before it certainly supports the approach it selected even if other, hypothetical studies might have suggested different courses of action." 538 U.S. at 528; see *Flores*, 507 U.S. at 308, 313-314; *Carlson* v. *Landon*, 342 U.S. 524, 541 (1952).

2. The court of appeals' rule would cause the very harms Congress enacted Section 1226(c) to prevent. Criminal aliens would presumptively be entitled to release into society after six months, could reoffend, and could flee and thwart the government's efforts to remove them. And individual DHS agents and immigration judges would be back in the very position from which Congress removed them, making difficult predictions whether an individual criminal alien would be a flight risk or danger—and indeed now requiring them to release the criminal alien unless the government showed by clear and convincing evidence that he poses a risk of flight or danger.

Evidence since *Demore* illustrates that flight and recidivism remain serious concerns. As noted above, EOIR has calculated an *in absentia* rate of 41% for released aliens in fiscal year 2015. *2015 Yearbook* P3. That is far in excess of the *in absentia* rates calculated in a study before Congress when it enacted Section 1226(c), and another study before the Court in *Demore*, which this Court described as "striking." 538

U.S. at 520. Similarly, a recent study calculated a recidivism rate of approximately 30% among 323 criminal aliens released from immigration custody in New England, for any reason, from 2008 to 2012. Maria Sacchetti, *Criminal Aliens Reoffend at Higher Rates than ICE Has Suggested*, Boston Globe, June 4, 2016.

C. Construing Section 1226(c) To Have A Six-Month Limitation Of The Sort This Court Imposed In *Zadvydas* Also Would Be Inconsistent With *Demore*

1. Even if it were permissible to look beyond Section 1226(c)'s explicit text and clear statutory purpose to bar release, there would be no basis for construing Section 1226(c) to require that mandatory detention of every covered alien cease after six months. In *Demore*, this Court held that "Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as respondent be detained for the brief period necessary for their removal proceedings." 538 U.S. at 513; see *id.* at 526 ("[T]he Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings."). The Court noted that detention under Section 1226(c) "is of a much shorter duration" than the "potentially permanent" detention in *Zadvydas*, and "in the majority of cases it lasts for less than the 90 days we considered presumptively valid in *Zadvydas*." *Id.* at 528-529 (citation omitted); see *id.* at 529 n.12 ("very limited time").[10] And the Court con-

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[10] This Court cited statistics the government had provided calculating that, for aliens in immigration detention under Section 1226(c), "removal proceedings are completed in an average time of

cluded that Kim's detention was constitutional notwithstanding that he had been detained "somewhat longer than the average—spending six months in INS custody" before being released. *Id.* at 530-531.

The court of appeals took this Court's references to "brief" and "very limited" time, coupled with the cited statistics, to imply that Section 1226(c) is constitutionally doubtful whenever detention becomes "prolonged." Pet. App. 13a. And it extended *Zadvydas*'s constitutional-avoidance rationale to conclude that detention is per se "prolonged"—and therefore no longer authorized—at six months. *Ibid.*

Again, even putting aside Section 1226(c)'s clear text, a six-month cap cannot be squared with *Demore*. At the outset, *Demore* held that it is constitutional to detain a criminal LPR under Section 1226(c), without a bond hearing, where his detention had already last-

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47 days and a median of 30 days," and that an appeal takes "an average of four months, with a median that is slightly shorter." *Demore*, 538 U.S. at 529. This Court also stated that the total time for appealed cases was "about five months." *Id.* at 530. EOIR has informed this Office that its prior calculations were erroneous. See Letter from Ian Heath Gershengorn, Acting Solicitor Gen., to Hon. Scott S. Harris, Clerk, Supreme Court 1 (Aug. 26, 2016), in *Demore, supra* (No. 01-1491). EOIR calculates that the average and median duration in cases without an appeal should have been 34 and 15 days, respectively, and the average and median for an appeal itself should have been 141 and 119 days, respectively. *Id.* at 2. And for reasons the letter explains, the overall time in cases where there was an appeal to the BIA was also considerably longer than five months, according to EOIR's statistics at the time (233 and 221 days, respectively) and its corrected calculations (382 and 272 days, respectively). *Id.* at 2-3. EOIR has published updated figures at *Statistics and Publications*, https://www.justice.gov/eoir/statistics-and-publications (last visited Aug. 26, 2016).

ed more than six months. 538 U.S. at 531.[11] And the Court's reversal of the lower court's rulings ordering Kim's release, *ibid.*, presumably contemplated that he could be restored to custody until his removal proceedings were complete. That "implicitly foreclos[es]" a bright-line six-month cap, *Reid*, 819 F.3d at 497, and belies the premise that detention becomes constitutionally dubious on or around the 181st day.

Demore also declined to adopt a *Zadvydas*-type limit as a matter of avoidance. This Court granted certiorari in *Demore* to resolve a circuit split, where two judges on a panel in one of those circuit cases had relied on *Zadvydas* to hold that detention under Section 1226(c) should be limited to a reasonable period, with six months being presumptively reasonable. See *Demore*, 538 U.S. at 516; *Welch* v. *Ashcroft*, 293 F.3d 213, 228 (4th Cir. 2002) (Widener, J., concurring); *id.* at 234-235 & n.7 (Williams, J., concurring in the judgment). The government argued that "that approach lack[ed] a specific foundation in the text or history of Section 1226(c)," *Demore* Pet. Br. 48, and Kim pressed a narrowing construction focusing on the phrase "is deportable." *Demore* Resp. Br. 40-50. This Court adopted neither view. And the principal dissent in *Demore* emphasized that "[d]etention under § 1226(c) is not limited by the kind of time limit imposed by the Speedy Trial Act, and while it lasts only as long as the removal proceedings, those proceedings have no deadline and may last over a year." 538 U.S. at 558 (Souter, J., concurring in part and dissenting in part); see *id.* at 567 ("often extend[s] beyond the time suggested

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[11] Kim had already been detained at least 197 days: He was taken into custody on February 2, 1999, and granted bond on August 18, 1999. See *Demore* Pet. Br. 4; *Demore* J.A. 11.

by the Court"). Only one Justice would have adopted a narrowing construction: Justice Breyer advocated a *Zadvydas*-type limit when the alien concedes removability, and otherwise construing "is deportable" to allow bond. *Id.* at 576-578 (Breyer, J., concurring in part and dissenting in part). *Demore* accordingly implicitly declined similar efforts to impose a *Zadvydas*-type rule under Section 1226(c).

Moreover, *Demore* expressly rejected the underlying analogy to *Zadvydas* and explained why the two cases were "materially different." *Demore*, 538 U.S. at 527. First, the detention in *Zadvydas* no longer "serve[d] its purported immigration purpose": Aliens are detained after they are ordered removed in order to actually effectuate their removal, but in *Zadvydas* removal was "no longer practically attainable." *Ibid.* (quoting *Zadvydas*, 533 U.S. at 690). Other countries had refused to accept the aliens, so there was no country to which to return them. See *Zadvydas*, 533 U.S. at 684, 702. By contrast, this Court emphasized in *Demore* that detention of criminal aliens "*pending their removal proceedings* * * * necessarily serves the purpose of preventing [them] from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." 538 U.S. at 527-528; see *id.* at 528 (discussing evidence that "large numbers of deportable criminal aliens skipp[ed] their hearings and remain[ed] at large in the United States unlawfully."). Those purposes do not lapse after six months.

Second, *Zadvydas* involved "indefinite" and "potentially permanent" detention because it "ha[d] no obvious termination point." *Demore*, 538 U.S. at 528-529 (quoting *Zadvydas*, 533 U.S. at 690-691, 697). By con-

trast, this Court emphasized in *Demore*, "*detention pending a determination of removability*" has a "definite termination point": entry of a final order of removal. *Id.* at 529 (quoting *Zadvydas*, 533 U.S. at 697). The duration of removal proceedings varies and will be unknown in any particular case until it is completed. But detention under Section 1226(c) is still "limited," not indefinite or potentially permanent, because it ends when removal proceedings end, as they always do. The court of appeals' reliance on *Zadvydas* to limit detention under Section 1226(c) is thus fundamentally contrary to *Demore*.

2. A bright-line cap at six months or any other time suffers from further flaws. First, *Zadvydas* itself did not apply a bright-line cap. It instead held that detention could continue past six months "until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." 533 U.S. at 701. Second, Section 1226(c) "does not come ready-made with a time cutoff the way" the statute at issue in *Zadvydas* does. *Sopo* v. *U.S. Attorney Gen.*, No. 14-11421, 2016 WL 3344236, at *14 (11th Cir. June 15, 2016). The removal period in Section 1231(a) is presumptively 90 days, "to which [*Zadvydas*] appended another 90 days" to reach six months. *Ibid.* By contrast, Section 1226(c) "contains no time limitation at all on which to base a firm cutoff." *Ibid.*

Third, "the complex course of events during removal proceedings" makes a fixed cap inappropriate both as a statutory and constitutional matter. *Sopo*, 2016 WL 3344236, at *14; see *Ly* v. *Hansen*, 351 F.3d 263, 272 (6th Cir. 2003) (discussing the "inevitable elasticity" of removal proceedings). "[R]emoval proceedings involve many * * * exigencies and the con-

duct of the criminal alien can equally affect the duration of that alien's removal proceedings." *Sopo*, 2016 WL 3344236, at *14. Some aliens may concede they are removable, pursue no relief, and be removed very swiftly. Others may seek discretionary relief from removal to remain in the United States, notwithstanding that they are removable. "Some [aliens] ask for multiple continuances"; "some choose to file frivolous appeals"; others file reasonable appeals; others do not appeal at all; "and each [immigration judge] has a docket with different demands." *Ibid.* A one-size-fits-all approach is simply not appropriate for a large, complex, and multi-tiered system of administrative adjudication of widely varying cases.

Demore reinforces this point. Although this Court noted that mandatory detention under Section 1226(c) typically lasted less than 90 days, 538 U.S. at 529, it recognized that an alien's own litigation choices can extend detention beyond that range, and that this feature of the adjudicatory process does not undermine the constitutionality of continued detention. Kim's "removal hearing was scheduled to occur" after five months, "but [he] requested and received a continuance to obtain documents relevant to his withholding application." *Id.* at 531 n.15. The Court gave no hint that the five-month schedule was problematic, or that it became problematic when the hearing was postponed because Kim sought more time to strengthen his request for relief from removal.

The Court further noted that, when the alien decides to appeal to the BIA, that step takes yet more time. See *Demore*, 538 U.S. at 529. But again, the Court viewed detention during that time as a valid consequence of the alien's choices within the adjudica-

tory system. "As we have explained before," the Court reasoned, "'the legal system . . . is replete with situations requiring the making of difficult judgments as to which course to follow,' and, even in the criminal context, there is no constitutional prohibition against requiring parties to make such choices." *Id.* at 530 n.14 (quoting *McGautha* v. *California*, 402 U.S. 183, 213 (1971)); see *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 30-31 (1973).

Justice Kennedy's concurrence in *Demore* reflects a similar understanding. Justice Kennedy joined the majority opinion and further explained that, in his view, an LPR "could be entitled" to a bond hearing, presumably as a matter of due process, "if the continued detention became unreasonable or unjustified." 538 U.S. at 532. But he viewed the constitutionality of continuing detention as depending on the reasons: If there were an "unreasonable delay *by the INS* in pursuing and completing deportation proceedings," he explained, it "could become necessary" to ask whether "the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, *but to incarcerate for other reasons.*" *Id.* at 532-533 (emphases added). Justice Kennedy could not draw such an inference, however, "from the circumstances of" *Demore* itself. *Id.* at 533. The implication is that the extension of removal proceedings caused by an alien's litigation choices within the ordinary operation of an adjudicatory system does not cast doubt on the constitutionality of detention, because it continues to be justified by the interests in "protect[ing] against risk of flight or dangerousness." *Id.* at 532.

Criminal aliens who are removable but seek discretionary relief from removal, such as cancellation of

removal, 8 U.S.C. 1229b, also have a particularly weak claim to be released into the United States pending a decision on their request. Such an alien's crime makes him removable, eliminating any entitlement to be present in the United States. And the question whether to grant cancellation of removal to allow the alien nonetheless to remain is "manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace." *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956)); see *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (it is akin to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict"). But under the court of appeals' ruling, the key question—whether the alien can live in the United States—would be made in the first instance not when deciding the request for relief, but in a bond hearing.

It is thus true, as the court of appeals noted, that "[n]on-citizens who vigorously pursue claims for relief from removal face substantially longer detention periods than those who concede removability." Pet. App. 19a. But that is a natural consequence of Congress's commendable decision to establish a robust system of administrative adjudication that affords even convicted criminal aliens opportunities to challenge their removability, apply for relief, and seek appellate review. The fact that criminal aliens who take advantage of the process afforded to them are detained while the system adjudicates their claims is not a sign of a *lack* of due process; it is a sign that extensive process has been provided. Once invoked, completing any process takes time.

Section 1226(c) puts aliens on clear notice that the immigration consequences of committing a specified

offense include not only that they will become removable, but also that they will be detained throughout removal proceedings. And *Demore* reinforces that criminal aliens whose removal proceedings (and resulting detention) last longer because they seek relief from removal or otherwise make litigation choices that prolong their proceedings do not thereby gain the possibility of release: "[T]here is no constitutional prohibition against requiring parties to make such choices." *Demore*, 538 U.S. at 530 n.14.

The court of appeals' holding, by contrast, would confer the windfall of a presumptive entitlement to release on aliens whose litigation choices lead to longer proceedings. Indeed, it would create a powerful incentive for aliens to extend litigation. The First, Third, Sixth, and Eleventh Circuits have rejected a rigid six-month cap in part because of this concern. See *Sopo*, 2016 WL 3344236, at *14 ("[W]ere we to impose a strict cutoff, a criminal alien could deliberately cause months of delays in the removal proceedings to obtain a bond hearing and then abscond and avoid removal altogether."); *Reid*, 819 F.3d at 501 (differentiating delays due to "dilatory tactics"); *Chavez-Alvarez* v. *Warden York Cnty. Prison*, 783 F.3d 469, 476 (3d Cir. 2015) ("[A]liens who are merely gaming the system to delay their removal should not be rewarded with a bond hearing they would not otherwise get."); *Ly*, 351 F.3d at 272 (cautioning against rewarding aliens who "raise frivolous objections and string out the proceedings"). In the speedy trial context, this Court has similarly rejected "rigid" time requirements and instead required balancing of factors, including the reasons for delay and whether it is "attributable to the de-

fendant." *Barker* v. *Wingo*, 407 U.S. 514, 527, 529 (1972); see *id.* at 522-531.

3. Under *Demore*, Section 1226(c) will almost always be constitutional even in cases involving more than six months of detention: Detention will continue to serve its immigration purposes, and much of the time taken will be due to an alien's litigation decisions.

Aliens may seek one or more continuances, including to hire counsel and prepare their case. Continuances are granted "for good cause shown." 8 C.F.R. 1003.29. That standard is often liberally applied. *E.g.*, *Montes-Lopez* v. *Holder*, 694 F.3d 1085, 1087 (9th Cir. 2012) (reversing denial of third continuance, even though immigration judge "warned" that the second "would be [the] last"); *Ahmed* v. *Holder*, 569 F.3d 1009, 1012-1013 (9th Cir. 2009) (collecting cases and reversing denial of second six-month continuance). And aliens often obtain continuances. For example, based on a sample of studied members of the class in this case—which is limited to aliens detained for more than six months—the government's expert testified that 86.9% had requested a continuance; that "over half" requested three or more; that alien-requested continuances within the first six months of detention alone were typically responsible for more than half of that period (consuming a median of 101 days); and that in 18.6% of cases the alien-sought delay in the first six months was 151 days or more. J.A. 136-137, 153.

An alien may seek relief from removal, which necessitates time to determine whether the individual is eligible for and warrants such relief. For example, respondents' expert found that a request for relief, on

average, added 61 days to studied class members' detention. J.A. 80.

An alien may appeal to the BIA, which necessitates time to prepare briefs and decide the appeal. Respondents' expert found that, among studied class members, cases that are appealed to the BIA last 118 days longer on average. J.A. 76; see *Demore*, 538 U.S. at 529. Seeking relief from removal *plus* appealing adds more time: Respondents' expert calculated that seeking relief and appealing added 192 days to the average (from 281 to 473). J.A. 81. And an alien may file a petition for review and seek a stay, which in the Ninth Circuit will add yet more time: Under circuit precedent, time during a stay of removal counts towards the six-month clock, see Pet. App. 51a; note 4, *supra*; and any alien who requests a stay of removal automatically receives one "until the court rules on the stay motion," *De Leon* v. *INS*, 115 F.3d 643, 644 (9th Cir. 1997). Respondents' expert found that detention of class members lasts, on average, 219 days longer when a case is appealed to the Ninth Circuit rather than ending at the BIA. J.A. 76.[12]

The district court did not make factual findings regarding the competing experts' calculations, which were contested. But on any view, aliens who seek multiple continuances or appeal to the BIA will frequently be in removal proceedings for well more than six months. Aliens who seek relief from removal also will frequently be in removal proceedings longer. And by definition, many cases take longer than the average or median, consistent with the reasonable administra-

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[12] The expert's average for class members who seek relief, appeal to the BIA, and appeal to the Ninth Circuit was 400 days longer than those who take none of those steps. J.A. 81.

tion of the robust adjudicatory system Congress provided, while still remaining within the normal range for comparable cases.

In the end, moreover, criminal aliens detained under Section 1226(c) are almost always found removable and usually ordered removed. That is true even within the class in this case, which is limited to aliens detained for more than six months and therefore disproportionately consists of aliens who are litigating vigorously. The fact of removability ordinarily will be established, beyond dispute, by the alien's conviction. Respondents' expert calculated that only 5% of completed cases (20 of 409) for studied Section 1226(c) subclass members were "terminated," meaning that the alien defeated the charge that he was removable. J.A. 96. And although class members are disproportionately likely to seek relief from removal, respondents' expert calculated that most of those requests were denied: of the 409 completed cases, 324 sought relief and 130 were granted. J.A. 95-96. Virtually all of those were requests for discretionary relief, as a matter of grace, for criminal aliens lacking any legal right to be present in the United States. J.A. 94 (97% of requests were for discretionary relief).[13]

Respondents have emphasized their expert's testimony (Br. in Opp. 7 & n.3) that the average duration of detention for studied class members was 404 days. But that figure is not representative of the far larger category of *all* aliens detained under Section 1226(c), which is the proper focus of a broad-based challenge, because the class definition ensures that "[a]liens

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[13] In the remaining completed cases studied (259 of 409), the alien was removed, ordered removed, or ordered to voluntarily depart. J.A. 96.

detained for shorter periods are not included in the data at all." J.A. 171. The class members' experience instead largely illustrates the unremarkable proposition that resolving claims by people who contest issues, request relief, or seek extra time to prepare will take longer than for those who do not.

Furthermore, even if the 404-day figure were fairly representative, it would not itself indicate that the resulting detention is constitutionally doubtful. As explained above, the constitutionality of mandatory detention under Section 1226(c) depends on whether it continues to serve its purposes of preventing flight and recidivism. *Demore*, 538 U.S. at 527-529; see *id.* at 531-532 (Kennedy, J., concurring). Detention continues to serve those purposes even when the affected aliens sometime face difficult choices between litigating while in detention, or forgoing some or all claims and being removed—and thus released—faster. *Id.* at 530 n.14. The 404-day average lumps together all time in detention, no matter the cause, including delays due to alien-requested continuances, alien-initiated requests for discretionary relief from removal, and alien-initiated appeals to the BIA and the Ninth Circuit. That figure thus obscures the considerations *Demore* identified as relevant, and accordingly does not indicate a constitutional problem.

D. Any Relief From Detention Must Be Sought In An Individual Habeas Proceeding Raising An As-Applied Constitutional Challenge

As explained above, the avoidance canon cannot be applied to override Congress's unambiguous mandate that release is allowed "only if" the narrow witness-protection exception is satisfied. 8 U.S.C. 1226(c)(2). The proper avenue for presenting a claim that deten-

tion under Section 1226(c) has become impermissibly prolonged is therefore through an as-applied constitutional challenge in an individual habeas corpus proceeding.

Demore provides guideposts for evaluating such a challenge: Mandatory detention of a criminal alien during removal proceedings remains "constitutionally permissible" so long as it serves its "purported immigration purpose" of facilitating removal and preventing flight and recidivism. *Demore*, 538 U.S. at 527, 531; see *id.* at 532-533 (Kennedy, J., concurring). Conversely, mandatory detention may cease to be constitutionally permissible if it no longer furthers these purposes, and instead is for some "other reasons." *Id.* at 533 (Kennedy, J., concurring). The constitutionality of prolonged mandatory detention thus depends on the reasons why it is continuing. And because longer detention imposes a greater imposition on an individual, as the passage of time increases a court may scrutinize the fit between the means and the ends more closely, see *Zadvydas*, 533 U.S. at 690, 701.

The government's interest in preventing recidivism by a criminal alien is ordinarily constant throughout any Section 1226(c) case, and weighs heavily in favor of constitutionality. Congress has made a considered judgment, backed by evidence and experience, that it is not acceptable for an alien who has committed one of the specified crimes to remain free in our society, where he could flee or reoffend while removal proceedings are ongoing. See *Demore*, 538 U.S. at 528. The government's interest in preventing flight will also ordinarily continue (and indeed strengthen) over time. Both the government's interest in effectuating removal and the alien's incentive to flee become par-

ticularly strong when entry of a final order of removal approaches. And *Demore* establishes that the government's interests do not weaken simply because an alien's good-faith litigation choices require that additional time be spent in removal proceedings. See *id.* at 530-531 & n.14. Accordingly, unlike in *Zadvydas*, detention during a removal proceeding under Section 1226(c) is entitled to a strong presumption of constitutionality for its duration.

A criminal alien detained markedly beyond the range of time taken to resolve most similar cases in this adjudicatory system could overcome that presumption of validity, however, by showing that the length of the proceeding is substantially attributable to unwarranted delays caused by the government. If there is "an unreasonable delay *by [DHS and EOIR]* in pursuing and completing deportation proceedings," that may indicate that continued detention is actually for an impermissible collateral purpose (or no purpose at all). *Demore*, 538 U.S. at 532 (Kennedy, J., concurring) (emphasis added). To show that the government is unreasonably delaying a proceeding, a criminal alien must first identify who is responsible for different periods of time. A criminal defendant must make a similar showing in the speedy trial context, see 18 U.S.C. 3161; *Barker*, 407 U.S. at 522-531, and a "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial," *Barker*, 407 U.S. at 532.

To avoid government-created delay, ICE policy is for attorneys to seek continuances in cases involving detained aliens only when "absolutely necessary," and to seek to expedite the resolution of applications for relief. Office of the Principal Legal Advisor, ICE,

Continuances and Briefing Extensions Before EOIR (July 1, 2014); ICE, *Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions* 1-3 (Aug. 20, 2010). Immigration judges and the BIA similarly prioritize cases involving detained aliens. See Dep't of Justice, *Administrative Review and Appeals: FY 2017 Performance Budget, Congressional Budget Submission* 19.[14] If, notwithstanding these efforts, the government is responsible for an unusually long proceeding, the alien may have a potential due process claim. Conversely, when proceedings are appropriately extended because of an alien's own good-faith litigation choices, that does not undermine the purpose of detention. And any delay due to an alien's bad-faith tactics is surely constitutional.

There is no occasion here, however, for the Court to decide when an as-applied constitutional challenge would be viable, because that is a case-specific question that is not properly resolved in the abstract in class action litigation. This Court therefore should reverse the judgment below allowing criminal aliens detained under Section 1226(c) to be released on bond after six months or any other fixed time limit. The statutory text forecloses it, the Constitution does not require it, and such a rule would undermine important governmental interests recognized by this Court in

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[14] This Court may wish to urge circuit courts to expedite consideration of petitions for review when the alien is detained. But a detained alien should ordinarily be expected to seek expedition rather than accepting delay and then challenging the resulting length of his detention.

Demore.[15] The question in any individual habeas case in the future must be whether removal proceedings and resulting detention of exceptional duration continues to serve their valid immigration purpose.

III. THE COURT OF APPEALS ERRED IN REWRITING THE PROCEDURES THAT GOVERN BOND HEARINGS

The court of appeals further erred in refashioning bond hearings by (1) shifting the burden of proof to the government and demanding clear and convincing evidence that the alien is a flight risk or danger; (2) requiring bond hearings for all class members automatically every six months, even when the alien has not shown that circumstances have materially changed; and (3) requiring immigration judges to consider as a factor the length of time the alien has been detained.

A. The Court Of Appeals Erred In Shifting And Heightening The Burden Of Proof

1. There is no basis for shifting the burden to the government to justify detention during removal proceedings—much less to require the government to bear that burden by clear and convincing evidence.

a. Section 1226(c) unambiguously forecloses a rule that the government must bear the burden of proving that a criminal alien covered by that provision is a danger or a flight risk, even in the narrow circumstance where release is allowed. Congress provided that, in the "only" situation when such a criminal alien

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[15] Section 1226(c)'s text likewise forecloses a more generalized standard of reasonableness, which some courts have adopted as a matter of avoidance. See *Supo*, 2016 WL 3344236, at *12-*14 (adopting this approach and collecting cases).

may be released during removal proceedings—for witness protection—"*the alien*" must demonstrate that he "will *not* pose a danger" or flight risk. 8 U.S.C. 1226(c)(2) (emphases added). Indeed, Congress placed the burden on LPRs convicted of aggravated felonies even before it enacted Section 1226(c) to make detention mandatory. See Immigration Technical Corrections Act of 1991, Pub. L. No. 102-232, Tit. III, § 306(a)(4), 105 Stat. 1751 (prohibiting release "unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear"); cf. 18 U.S.C. 3143(b)(1)(A) (similar for bail pending appeal).

b. Imposing the burden of proof on the government would also be fundamentally inconsistent with Section 1225(b). The longstanding rule is that an alien seeking admission must be detained unless he is "clearly and beyond a doubt entitled" to be admitted, 8 U.S.C. 1225(b)(2)(A), and "the alien has the burden" in that context, 8 U.S.C. 1229a(c)(2). See 8 U.S.C. 1361. It would be manifestly inconsistent with those provisions to require that an arriving alien who is *not* clearly entitled to be admitted nonetheless is entitled to be released into the United States unless the *government* can prove, by clear and convincing evidence, that he is a flight risk or danger.

Such a rule would also reward the party with the best access to information regarding flight risk and danger—the alien—for not sharing it, allowing an inadmissible alien to physically enter the United States due to an information asymmetry, because DHS may know little about a newly arriving alien. DHS also may have concluded that the alien should not be released

on parole. In short, the Ninth Circuit's unprecedented rule would substantially undermine the Secretary's ability to control the border and protect the security of the Nation.

c. Regulations and BIA decisions also unambiguously foreclose the Ninth Circuit's ruling that the government must bear the burden of proof (and by clear and convincing evidence) in bond hearings under Section 1226(a): Those regulations provide that "*the alien* must demonstrate" that he is *not* a flight risk or danger to persons or property. 8 C.F.R. 236.1(c)(8), 1236.1(c)(8) (emphasis added); see *In re Guerra*, 24 I. & N. Dec. 37, 40 (B.I.A. 2006) ("The burden is on the alien."). That rule is unambiguous and reasonable, and warrants full *Chevron* deference.

Before IIRIRA, the government applied a presumption that non-criminal aliens detained under Section 1226(a) would be released on bond, unless the government could show by a preponderance that he was a flight risk or danger. See 62 Fed. Reg. at 10,323. In response to IIRIRA, INS promulgated regulations placing the burden on the alien. *Ibid.* Some objected, but INS concluded that this change was "consistent with the intent of Congress" in IIRIRA. *Ibid.* INS explained that it had been "strongly criticized for its failure to remove aliens who are not detained." *Ibid.* It also explained that Congress's mandate, "as evidenced by budget enhancements and other legislation," including for increased bed space to hold aliens, "is increased detention to ensure removal." *Ibid.* That reflects a reasonable implementation of IIRIRA, and it has been in place for nearly 20 years. And since the dawn of federal immigration law, the government has never borne the burden to prove by clear and

convincing evidence that an alien should be detained during removal proceedings.

2. Contrary to the court of appeals' reasoning (Pet. App. 52a-53a), the constitutional standard for involuntary commitment of the mentally ill is inapposite. See *Singh* v. *Holder*, 638 F.3d 1196, 1203-1204 (9th Cir. 2011) (citing *Addington* v. *Texas*, 441 U.S. 418, 425-427 (1979)). Unlike involuntary commitment, the government has plenary authority over immigration and the exclusion or expulsion of aliens. See *Flores*, 507 U.S. at 305 ("Over no conceivable subject is the legislative power of Congress more complete.") (quoting *Fiallo*, 430 U.S. at 792). And "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Mathews* v. *Diaz*, 426 U.S. 67, 79-80 (1976).

This Court has long recognized that detention during removal proceedings is an integral aspect of removal itself, and it has repeatedly upheld detention of aliens during removal proceedings under standards that did not require the government to provide clear and convincing evidence. See *Demore*, 538 U.S. at 531; *Flores*, 507 U.S. at 306; *Carlson*, 342 U.S. at 538; *Wong Wing*, 163 U.S. at 235. Indeed, in *Zadvydas*, this Court placed the burden on "the alien" who is subject to potentially indefinite detention following entry of a final order of removal to show "that there is no significant likelihood of removal in the reasonably foreseeable future." 533 U.S. at 701. And in *Demore*, counsel for the alien told this Court that there was "no problem" with placing the burden of proof on the alien. *Demore* Oral Arg. Tr. 48.

B. New Bond Hearings Are Not Required Automatically Every Six Months

When an alien is detained under Section 1226(a), the Secretary "may" continue to detain the alien or "may" release him on bond. 8 U.S.C. 1226(a)(1) and (2). The Secretary thus has discretion whether to release an alien detained under Section 1226(a) on bond. See *Carlson*, 342 U.S. at 540. Federal regulations have long provided that aliens detained under Section 1226(a) are automatically assessed for bond eligibility at the outset and, if denied bond by DHS, informed of their opportunity to ask an immigration judge for a redetermination. 8 C.F.R. 236.1(d)(1), 1236.1(d)(1); see J.A. 43 (notice given to detained aliens). An alien can appeal to the BIA. 8 C.F.R. 236.1(d)(3). And, if the alien is denied or fails to post bond, the alien can later obtain another hearing by showing that "circumstances have changed materially." 8 C.F.R. 1003.19(e).

These procedures have been in place for decades, see *In re Chew*, 18 I. & N. Dec. 262, 263 n.2 (B.I.A. 1982), and warrant *Chevron* deference. There is no basis for invalidating them on their face. The court of appeals asserted that due process "requires" automatic hearings because "longer detention requires more robust procedural protections." Pet. App. 56a; see *id.* at 58a. But due process is satisfied in this context when there is a "facially legitimate and bona fide reason" for the rule. *Fiallo*, 430 U.S. at 794-795 (citation omitted). And even outside immigration, due process is satisfied by "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976) (citation and internal quotation marks omitted). The existing procedures readily satisfy both standards, because an alien

who has not been released on bond can obtain later review. Cf. 18 U.S.C. 3142(f) (allowing a new bail hearing "if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on" the defendant's bail risk).

C. Bond Hearings Need Not Consider Factors Beyond Bail Risk

Section 1226(c)(2) and federal regulations also foreclose the court of appeals' revision of the factors that immigration judges must consider in determining whether to grant bond. Those provisions unambiguously provide that release during removal proceedings, when it is allowed, depends on whether the alien will "pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." 8 U.S.C. 1226(c)(2); see 8 C.F.R. 236.1(c)(8), 1236.1(c)(8) (similar for aliens detained under Section 1226(a)). And it is well-settled outside the immigration context that bail determinations are properly made on that basis—not the period of time that has elapsed or that might elapse if bail is denied. See 18 U.S.C. 3142(f)(2), 3143(b)(1)(A).

The court of appeals nonetheless held that immigration judges must also consider the length of detention as a factor, because "longer detention requires more robust procedural protections." Pet. App. 56a. Even if that were true in this context, it would impermissibly double count the length of detention, which (under the court's predicate rulings) would already trigger the "more robust" procedures of a bond hearing under Sections 1225(b) and 1226(c) in the first place. Forcing immigration judges to consider the passage of time in bond hearings would put a substan-

tive thumb on the scales, and create a further reward for aliens to pursue time-consuming litigation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

DAVID JENNINGS, *et al.*,

Petitioners,

v.

ALEJANDRO RODRIGUEZ, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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STATEMENT OF THE CASE

Respondents are members of a certified Class of thousands of people. The Government has incarcerated all of them for a prolonged period of time—at least six months and, in many cases, for years—while they defend against removal charges. The well-developed record in this case demonstrates that the Class includes many lawful permanent residents with minor criminal histories, asylum seekers who have passed an initial screening allowing them to raise their claims in removal proceedings, and others who present no danger or flight risk. The record also shows that the vast majority of Class members have substantial defenses to removal, and that a large majority who received a hearing before an Immigration Judge under the injunction issued below were granted bond because they present no danger or flight risk.

The central question is whether the immigration detention statutes must be read to require the prolonged incarceration of these individuals without an individualized custody hearing as to danger and flight risk, and, if so, whether they are constitutional.

Respondents do not seek the mass release of Class members, only individualized hearings required under this Court's civil detention precedents. By definition, the Class excludes noncitizens detained under statutes that expressly authorize prolonged detention for national security reasons. Unlike those statutes, the ones at issue here are silent as to the length of detention they authorize.

The Ninth Circuit correctly held that the applicable statutes do not authorize Class members' prolonged detention without custody hearings.

STATUTORY FRAMEWORK

This case concerns the interpretation and, potentially, the constitutionality of three immigration detention statutes: 8 U.S.C. 1226(c), 1225(b), and 1226(a). Fairly read, particularly in light of the constitutional concerns that would otherwise arise, Sections 1226(c) and 1225(b) do not authorize Class members' prolonged detentions, and Section 1226(a) does so only after a constitutionally-adequate custody hearing. None of the statutes specifically authorizes prolonged detention without hearings, in contrast to other immigration detention statutes that establish special review procedures for prolonged detention in national security cases. *Compare* 8 U.S.C. 1226(c), 1225(b), 1226(a), *with id.* 1226a(a)(6), (a)(7), 1537(b)(2)(C).

The Class includes three subclasses defined by the relevant immigration law provisions: Section 1226(c), Section 1225(b), and Section 1226(a).

1. The "Mandatory Subclass" consists of individuals residing in the United States who are detained under color of Section 1226(c), which provides that "the Attorney General shall take into custody any alien who" is made removable based on one of a broad range of criminal grounds—including certain misdemeanors and simple drug possession offenses—"when the alien is released" from criminal custody. Petitioners interpret Section 1226(c) to require detention for the duration of removal proceedings without any individualized custody hearing before an Immigration Judge (IJ), regardless of detention length.

2. The "Arriving Subclass" consists of noncitizens who present themselves at a port of entry and are subject to prolonged detention without hearings

under color of two provisions of Section 1225(b): Section 1225(b)(1)(B)(ii) and Section 1225(b)(2)(A). App. 108a.

Sections 1225(b)(1)(B)(ii) and (b)(2)(A) apply only to the small percentage of arriving noncitizens whom the Government refers for full removal proceedings before an IJ. In contrast, the large majority of individuals arriving at our borders and detained under Section 1225(b) are not in the Arriving Subclass because they face expedited removal.

Section 1225(b)(1)(B)(ii) provides that arriving individuals who are otherwise subject to expedited removal, but establish a "credible fear of persecution" during an initial interview, "shall be detained for further consideration" of their application for asylum, which occurs at a removal hearing.

> The credible fear standard is designed to weed out non-meritorious cases so that only applicants with a likelihood of success will proceed to the regular asylum process. If the alien meets this threshold, the alien is permitted to remain in the U.S. to receive a full adjudication of the asylum claim—the same as any other alien in the U.S.

H.R. Rep. No. 104-469, pt. 1, at 158 (1996).

Section 1225(b)(2)(A) applies to another category of individuals who arrive at a port of entry—those who are not subject to expedited removal because they possess documents providing some basis for admission, but who an immigration officer nonetheless determines are "not clearly and beyond a doubt entitled to be admitted." For example, lawful permanent residents (LPRs) returning from brief travel abroad may be subject to Section 1225(b)(2)(A) if an immigration officer concludes they have not established their right to admission. 8 U.S.C.

1101(a)(13)(C) (defining certain returning LPRs as "seeking . . . admission"). Under the statute, such LPRs "shall be detained for a [removal] proceeding." *Id.* 1225(b)(2)(A).

Thus, both Section 1225(b)(1)(B)(ii) and Section 1225(b)(2)(A) pertain to individuals who have been screened in by DHS for a full removal proceeding, rather than individuals subject to expedited removal. And both subsections authorize detention only "for" further consideration of such cases before an IJ, not "pending" those proceedings.[1]

Petitioners construe those provisions to prohibit individualized custody hearings before an IJ, no matter how prolonged the detention. On Petitioners' view, Arriving Subclass members can be considered for release only through the "parole" review process. *Id.* 1182(d)(5)(A). Department of Homeland Security (DHS) officers (i.e., the jailing authorities) informally conduct such reviews. Officers make parole decisions—that result in months or years of additional incarceration—by checking a box on a form that contains no specific explanation and reflects no deliberation. There is no hearing, no record, and no appeal. J.A. 225-26; J.A. 334-35; App. 39a. Extensive

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[1] The Subclass does not include individuals who were found *not* to have a credible fear of persecution. Such individuals are detained "pending" any review of the adverse credibility finding, and, if it is sustained, "until removed." 8 U.S.C. 1225(b)(1)(B)(iii)(IV). The Subclass also does not include individuals who crossed the border and entered the country without inspection. Such individuals are also detained under Section 1225(b)(1)(B)(ii), as "applicants for admission," but once they are found to have a credible fear and placed in removal proceedings, the agency provides them bond hearings. *Id.* 1225(a)(1), (b)(1)(A)(iii); *Matter of X-K-*, 23 I&N Dec. 731, 734-35 (BIA 2005).

record evidence establishes that the parole process causes arbitrary detentions because it lacks meaningful processes to correct even manifest errors. J.A. 226-34; App. 39a-40a.

3. The third subclass consists of individuals detained under Section 1226(a), which provides that a noncitizen "arrested and detained *pending* a decision on whether the alien is to be removed from the United States," (emphasis added), may be detained or released. Under implementing regulations, DHS conducts initial custody determinations, and IJs have authority to review those determinations at custody hearings. 8 C.F.R. 1236.1(d). The agency interprets those regulations to place the burden of establishing no danger or flight risk on the detainee. *Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006). If the IJ denies bond, regulations permit reconsideration only upon a material change in circumstances. The agency does not treat continued detention as a "changed circumstance." J.A. 317; App. 46a-47a.

Respondents contend Section 1226(a) governs the detention of all Class members and, in prolonged detention cases, the hearings it authorizes must include the following protections: (1) DHS bears the burden of proof by clear and convincing evidence; (2) hearings occur periodically; and (3) IJs consider the length of detention when determining whether release is warranted.

STATEMENT OF FACTS

1. Plaintiff Alejandro Rodriguez is a long-time LPR brought to the United States as an infant. He was employed as a dental assistant when DHS placed him in removal proceedings based on prior

convictions for possession of a controlled substance and "joyriding."

DHS detained Mr. Rodriguez for over three years while he challenged the removal charges before the IJ, Board of Immigration Appeals (BIA), and Ninth Circuit. After he moved for class certification in this case, DHS suddenly decided to release him. It then argued (unsuccessfully) that his release mooted the case and made him an unfit Class representative. App. 116a-18a.

Five months later, the Ninth Circuit granted the Government's unopposed motion to vacate and remand his case because the "joyriding" conviction was not an aggravated felony. Although he was still removable for a controlled substance offense, Section 1226(c)(1)(B), neither offense precluded him from seeking cancellation of removal. The IJ granted his application on remand, and he retained his LPR status. DHS chose not to appeal, thus ending the proceedings over seven years after they began. J.A. 257-60; J.A. 537-50. On Petitioners' view, Mr. Rodriguez apparently should have been detained during the entirety of that seven-year period before winning his case.

2. Mr. Rodriguez's case is not unique. The record documents numerous Class members whom Petitioners incarcerated for prolonged periods while they litigated meritorious defenses to removal. For example, one Mandatory Subclass member—a longtime LPR brought to the United States as a small child—was placed in removal proceedings based on a firearms offense. He was released on bond during his criminal proceedings and served eight days in jail. Nonetheless, Petitioners detained him without an opportunity for release for over 15 months. During this time, his pregnant U.S. citizen wife was forced

onto welfare, and he missed the birth of his daughter. He remained in detention while DHS processed an application permitting him to maintain his LPR status, which—despite repeated requests for expedited processing—took eight months. He was released after he won his case. J.A. 216-17.

Members of the Arriving Subclass also faced prolonged and arbitrary detention. One Subclass member, an Ethiopian asylum seeker, fled his homeland after he was abducted, held in captivity for over a year, and subjected to horrific acts of torture. After he escaped, he sought refuge in the United States, where he was incarcerated by DHS. He subsequently passed a credible fear screening and was referred for removal proceedings.

His sole opportunity for release while in proceedings was a parole determination. A DHS officer found he was not a danger, but denied release on the ground that his proof of identity was insufficient because "[t]here is an apparent correlation with all the Somalian Detainee's [sic] that present [sic] a paradigm of deceit and paralleled ambiguity of events and identity." J.A. 232-33. Had he been afforded a bond hearing, he would have had the opportunity to point out, among other things, that he was *not Somali*, as his government-issued photo identification showed. Instead, because the parole process provided him no hearing and no avenue to correct (or even be informed of) manifest errors, he remained detained. Eventually, an IJ granted him asylum. DHS declined appeal and he was released—six months after the parole denial, and after nine months of detention. J.A. 232-33; App. 40a; *see also* J.A. 229-31 (another Ethiopian detainee held over ten months based on the same error, even though DHS had previously verified his identity).

The record includes other detailed accounts of Class members' cases, as well as the underlying documents reflecting the review processes Petitioners employed prior to the injunctions. J.A. 209-69.[2]

3. Prior to the injunctions, hundreds of Class members were detained on any given day in the Central District of California. Their average detention was over 13 months, with a median of nearly one year. Over 20% were incarcerated for more than 18 months, and nearly 10% for more than two years. J.A. 71-73, tbls.2 & 3; App. 18a-19a.

Thus, the record confirms that, for Class members, the average detention lasts far longer than what the Court understood it to be in *Demore* v. *Kim*, 538 U.S. 510, 530 (2003) ("roughly a month and a half in the vast majority of cases . . . and about five months in [cases involving appeals]"). Petitioners recently acknowledged that *Demore* substantially understated detention lengths for cases involving appeals.[3]

4. DHS detains Class members in jails and private locked-down facilities under prison-like conditions. They wear jail uniforms and are subject to strict movement restrictions. Most can only have "no contact" visits with family—they talk on a phone

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[2] The record includes detailed information about approximately 1,000 Class members—all those who fell within the Class over a one year period—drawn from official government immigration files and databases; depositions; declarations; and the Government's policies and trainings. J.A. 203-07 (describing information sources).

[3] *See* Letter from Ian Heath Gershengorn, Acting Solicitor General, to Hon. Scott S. Harris, Clerk, Supreme Court 1-3 (Aug. 26, 2016), *Demore* v. *Kim*, 538 U.S. 510 (2003) (No. 01-1491).

across a transparent barrier for, at most, a few hours per week. J.A. 302-04; App. 20a.

Their prolonged detention imposes severe hardships on their U.S. citizen children and spouses. Excluding arriving asylum seekers, almost half of Class members arrived as children or young adults. J.A. 556-58. Over 60% have U.S. citizen children. *Id.*; App. 20a. Their detention deprives relatives, including sick parents and small children, of crucial support. *E.g.*, J.A. 217-19 (Class member unable to care for sick mother and then denied request to attend her funeral); App. 20a-21a.

5. Class members endure longer detentions than other noncitizens facing removal because most of them have substantial defenses that take additional time to litigate—such as an argument that the charge of removal is invalid, or grounds for relief such as cancellation of removal or asylum. J.A. 77, tbl.7; J.A. 86, tbl.17; J.A. 121-22; App. 19a. Class members are five times more likely to win their cases than the general detainee population. J.A. 122, tbl.35.

Seventy percent of Mandatory Subclass members filed applications for relief. Approximately 4% won their cases without the need to request relief, by arguing that DHS could not prove its charge. J.A. 96, tbls.25-26. Overall, nearly 40% won their cases. J.A. 95 & tbl.23; J.A. 135, tbl.38; App. 34a.

Their success reflects in part their comparatively minor criminal histories. Among Class members with some criminal history, most of whom are in the Mandatory Subclass, more than half had no conviction with a sentence of more than six months, and many spent far longer in immigration custody than criminal custody. J.A. 313-14; App. 34a.

Some faced prolonged detention despite receiving non-custodial sentences.

One LPR received a diversion sentence for drug possession, but was nonetheless subjected to mandatory detention despite evidence that he provided critical support to his ill mother and was a "standout" employee. He won his case, but only after ten months of detention. J.A. 211-13.[4]

6. Ninety-seven percent of Arriving Subclass members applied for asylum, and *two thirds* won. J.A. 98, tbl.28; J.A. 135, tbl.38; App. 40a. The overwhelming majority of them have no criminal history. J.A. 328; App. 20a.

PROCEEDINGS BELOW

This case arises from the third appeal in this litigation. In the first, the Ninth Circuit ruled the case could proceed as a class action, App. 101a-38a, after which Petitioners neither sought *certiorari* nor contested class certification on remand. In the second, the Ninth Circuit affirmed a preliminary injunction requiring bond hearings for the Mandatory and Arriving Subclasses. App. 61a-100a.

In the decision under review, the Ninth Circuit largely affirmed the district court's grant of permanent classwide relief. Applying the constitutional avoidance doctrine, the Ninth Circuit held that once detention under Section 1226(c) and 1225(b) becomes prolonged, those statutes no longer authorize detention. At that point, the Government's

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[4] Petitioners contend that "most" Class members with convictions lose their cases, Br. 45, but this ignores the significant barriers to success that detention itself imposes. J.A. 304-06; J.A. 521-24. Class members would prevail at even higher rates if released.

detention authority derives from Section 1226(a), which permits custody hearings. Looking to this Court's precedents, the Ninth Circuit held that detention becomes prolonged when it exceeds six months, and that DHS must provide a bond hearing at that point under Section 1226(a). App. 32a-38a, 39a-45a.

The Ninth Circuit also adopted certain protections necessary to satisfy due process requirements in prolonged detention cases: DHS bears the burden of proving danger and flight risk by clear and convincing evidence, the IJ must consider the length of detention, and periodic hearings must occur at six-month intervals. App. 51a-58a.

In the four years since the preliminary injunction issued, IJs have conducted thousands of hearings. In approximately 70% of them, an IJ found the Class member did not present a danger or flight risk and ordered release on bond or other conditions. J.A. 528. Of those permitted release on bond, 70% posted it. J.A. 529. The injunction also specifically requires IJs to consider release on alternatives to detention, including electronic ankle monitors. App. 53a. ICE's alternatives program—the Intensive Supervision Appearance Program (ISAP)—has achieved extraordinary success in ensuring appearance at removal hearings. J.A. 564-65 (DHS witness testimony that it achieved near-100% success in his region). By releasing individuals found not to present danger or flight risks, the injunction has saved millions of dollars in detention costs. J.A. 88-90.

SUMMARY OF ARGUMENT

1. An individualized hearing before a neutral decision-maker as to danger or flight risk is the bedrock due process requirement under this Court's

civil detention precedents. *See United States* v. *Salerno*, 481 U.S. 739, 750 (1987) (upholding pretrial detention of criminal defendants only with individualized findings of dangerousness or flight risk at bond hearings); *Foucha* v. *Louisiana*, 504 U.S. 71, 81-83 (1992) (requiring individualized finding of mental illness and dangerousness for civil commitment); *Kansas* v. *Hendricks*, 521 U.S. 346, 357 (1997) (upholding civil commitment of sex offenders after jury trial on dangerousness).

Demore v. *Kim*, 538 U.S. 510 (2003), carved out a narrow exception to the general rule that civil detention may be imposed only after an individualized hearing as to danger and flight risk. In doing so, the Court relied on two key factors: the Government's assertion that the average length of detention was "brief," and the individual respondent's concession of deportability. *Id.* at 513-14. Based on those factors, the Court held that the detention "necessarily" bore a close connection to the purpose of obtaining a (presumably imminent) removal order, and therefore satisfied due process. *Id.* at 528-29.

Demore does not control here because neither of its exceptional factors is present. First, the well-developed factual record here demonstrates that Class members, who by definition were detained for at least six months, were often incarcerated for much longer periods. Moreover, the brevity of detention asserted in *Demore* is undermined by the recent disclosure that the underlying data—submitted to this Court without prior adversarial testing—significantly understated the average detention length for some individuals under Section 1226(c). Because the deprivation of liberty at issue here is greater than in *Demore*, an individualized custody

hearing is required to ensure that detention continues to serve its purpose.

Second, the record demonstrates that a large majority of Class members present substantial defenses to removal, usually because their extensive ties, comparatively minor criminal histories, or other equities render them eligible for relief. They have powerful incentives to appear for removal proceedings that were largely absent in *Demore*, and cannot be conclusively presumed to present so great a danger or flight risk that they must always remain detained.

Because Class members' detentions do not come within *Demore*'s narrow exception, they violate the general rule that due process requires an individualized custody hearing.

Petitioners concede there may be some cases in which prolonged mandatory detention is unreasonable, but they contend there is no due process problem because detainees may file habeas petitions. But this Court has not held in its civil detention cases that the Government may be excused from its due process obligations because the courts can consider habeas petitions. Furthermore, the record below and experience in other circuits demonstrates that requiring Class members—who are often pro se, indigent, and not proficient in English—to file habeas petitions would deprive most of them of any detention review.

Petitioners specifically defend the denial of hearings to Arriving Subclass members, asserting that no due process constraints govern the detention of individuals stopped at the border. But detention "for any purpose" is governed by the Due Process Clause. *Addington* v. *Texas*, 441 U.S. 418, 425 (1979).

Shaughnessy v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), on which Petitioners rely, involved an individual ordered summarily excluded on national security grounds. Arriving Subclass members, by contrast, are *not* subject to expedited removal and are *not* detained on national security grounds. They are entitled to freedom from prolonged arbitrary detention.

2. Although Petitioners' detention regime raises serious constitutional problems, this Court need not resolve them. The governing detention statutes are all silent as to length of detention and fairly can be read not to authorize prolonged detention without hearings. In *Zadvydas* v. *Davis*, 533 U.S. 678, 697 (2001), this Court applied constitutional avoidance to another detention statute, construing it not to permit "long-term" detention. It should do the same here.

All six circuits to consider the question have concluded that Section 1226(c) does not clearly authorize prolonged mandatory detention. Instead, they read the statute to include an implicit reasonable time limitation. The Ninth and Second Circuits read the immigration detention statutes as a whole, including the national security statutes, to define that reasonable time as six months. When Congress wished to authorize detention without an IJ hearing beyond six months, it said so clearly. 8 U.S.C. 1226a(a) ("the Patriot Act") specifically authorizes immigration detention for six-month periods, but with specialized review procedures, and only in national security cases. *Id.* 1537(b)(2)(C) refers specifically to detention beyond six months in a national security context as well.

The Ninth and Second Circuits also adopted the six-month approach because it utilizes an

administrable rule, following this Court's guidance in *Zadvydas*.

The Ninth Circuit similarly construed Sections 1225(b)(1)(B)(ii) and 1225(b)(2)(A) not to authorize prolonged detention without a hearing. These subsections do not even govern detention "pending removal proceedings," let alone for prolonged periods. Where Congress sought to authorize the detention of individuals "pending" proceedings, it said so explicitly, as in both Section 1226(a) and a different provision of Section 1225(b) that applies to individuals who (unlike Class members) have *not* been screened in for removal proceedings. *Id.* 1225(b)(1)(B)(iii)(IV) ("[The] alien . . . shall be *detained pending* a final determination of credible fear of persecution and, if found not to have such a fear, *until removed.*" (emphases added)).

Detention authority under Sections 1225(b)(1)(B)(ii) and 1225(b)(2)(A) only applies until removal hearings begin, after which detention is governed by Section 1226(a), which already permits bond hearings.

3. Petitioners nonetheless insist they must incarcerate Class members for prolonged periods without hearings. Their arguments are contrary to the factual record and this Court's precedents.

Petitioners argue that providing bond hearings to Class members threatens public safety. This ignores that IJs deny release to those found to present a danger or flight risk. Moreover, the record refutes that claim. Many Class members have minor criminal histories, long-standing community ties, and substantial defenses that create powerful incentives to appear for hearings. Furthermore, the record shows that DHS can achieve extremely high appearance rates through its Intensive Supervision

Assistance Program (which did not exist when *Demore* was decided); the injunction requires IJs to consider releasing Class members into such intensive programs.

Petitioners also allege, without evidence, that the injunction will encourage dilatory tactics by detainees. However, all requests for additional time are not dilatory. The IJ presiding over the bond hearing will be most familiar with the facts, and well-situated to identify detainees who pursue frivolous defenses or continuances. Such individuals can be denied release because they present flight risks. And that some detainees may engage in such behavior does not obviate the need for a hearing. *Cf. McNeil* v. *Dir., Patuxent Inst.*, 407 U.S. 245, 251 (1972) ("[I]f confinement is to rest on a theory of civil contempt, then due process requires a hearing to determine whether petitioner has in fact behaved in a manner that amounts to contempt.").

Finally, Petitioners assert without evidence that the mere provision of a custody hearing to Arriving Subclass members will lead to a massive breach of border security. Respondents do not seek a mass release, only individualized hearings. Moreover, Petitioners *already* provide bond hearings to the far larger number of individuals who cross without inspection, are arrested after entry, and are subsequently found to have a credible fear of persecution. *Matter of X-K-*, 23 I&N Dec. 731, 734 (BIA 2005). Therefore, to the extent the injunction has any effect on the incentives of people fleeing persecution, it *encourages* them to present themselves at the border rather than cross without inspection.

4. The Ninth Circuit correctly applied this Court's civil detention precedents to require certain

minimal safeguards in prolonged detention custody hearings. As detention becomes more prolonged, the deprivation of liberty increases and warrants increased safeguards. *Zadvydas*, 533 U.S. at 701. The Ninth Circuit rightly required the Government to demonstrate danger or flight risk by clear and convincing evidence at periodic hearings that take into account detention length.

Petitioners resist those safeguards, citing the plenary power doctrine. But this case does not implicate Congress' plenary authority to regulate admission; it concerns freedom from physical restraint, where the plenary power "is subject to important constitutional limitations." *Zadvydas*, 533 U.S. at 695. For over a century, this Court has construed immigration statutes to include additional procedures in order to avoid due process problems. *See Yamataya* v. *Fisher*, 189 U.S. 86, 101 (1903); *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 50 (1950).

ARGUMENT

I. DUE PROCESS PROHIBITS PROLONGED CIVIL CONFINEMENT WITHOUT INDIVIDUALIZED CUSTODY HEARINGS.

A. Prolonged Detention Must Be Supported By An Individualized Hearing Before A Neutral Decision-Maker Who Assesses Danger And Flight Risk.

1. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690.

An individualized hearing as to danger and flight risk is the most basic due process requirement for

civil detention. But it is absent here. No other civil detention system permits incarceration of this length without an individualized hearing on danger and flight risk. This Court's cases require hearings before a neutral decision-maker at which the Government not only must establish the existence of some characteristic—such as probable cause that a crime has been committed or harm-threatening mental illness—that connects the detention to the purpose of the scheme, but *also* must make an individualized showing that the detainee presents a danger or flight risk. *See Salerno*, 481 U.S. at 750 (upholding civil pretrial detention of individuals charged with crimes only upon individualized findings of dangerousness or flight risk at custody hearings); *Foucha*, 504 U.S. at 81-83 (requiring individualized finding of mental illness and dangerousness for civil commitment); *Hendricks*, 521 U.S. at 357 (upholding civil commitment of sex offenders after jury trial on lack of volitional control and dangerousness).

In addition, when faced with *prolonged* confinement, this Court requires rigorous individualized procedures to ensure that detention length remains reasonable in relation to its purpose. *See generally Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972) ("*duration* of commitment" must bear "reasonable relation" to its purpose) (emphasis added). *Cf. McNeil*, 407 U.S. at 249 ("If the commitment is properly regarded as a short-term confinement with a limited purpose . . . then lesser safeguards may be appropriate, but . . . the duration of the confinement must be strictly limited."). Petitioners themselves recognize that "because longer detention [is] a greater imposition on an individual, as the passage of time increases a court may scrutinize the fit between the

means and the ends more closely." Br. 47 (citing *Zadvydas*, 533 U.S. at 701).

2. *Demore* carved out a narrow exception to the general rule described above. *Demore* upheld an individual's detention under Section 1226(c) without a hearing on danger and flight risk based on two factors: the Government's submission of data purporting to show the brevity of detention under the statute, and the fact that the detainee had conceded his deportability. Under those circumstances, the Court found that "brief" detention without a custody hearing was sufficiently tailored to the purpose of effectuating the presumably imminent entry of a removal order. 538 U.S. at 528-29.

Demore's narrow exception to the general rule requiring individualized custody hearings does not apply here because neither of the factors the Court relied upon is present. *First*, *Demore* was grounded in the Court's belief, derived from the Government's data, that detention lasts "roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal." *Id.* at 530. That understanding was incorrect. Furthermore, the detentions in this case are not brief. They average more than thirteen months, and more than fourteen for Mandatory Subclass members. J.A. 71-73; J.A. 95, tbl.24; App. 34a.

Second, unlike the detainee in *Demore*, a significant majority of Class members assert substantial defenses to removal. J.A. 95, tbl.23; J.A. 135, tbl.38; J.A. 96, tbls.25-26; App. 34a. These defenses give Class members powerful incentives to appear at hearings. Moreover, they often remain eligible for relief because they are individuals with comparatively minor criminal histories and deep ties to the

United States, and therefore do not present the type of categorical danger and flight risk that would necessarily justify detention.[5]

For example, Petitioners subject long-time LPRs with convictions for controlled substance possession to mandatory detention, even though they remain eligible for cancellation of removal, adjustment of status, and other forms of relief. *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1682, 1692 (2013). If they prevail, no removal order is ever entered. *See Matter of A-M-*, 25 I&N Dec 66, 73 n.8 (BIA 2009). Such individuals are routinely detained for years until they win. J.A. 313-14 (documenting three Subclass members with controlled substance offenses—for which they were sentenced to three months or less—detained one year and eight months, one year and nine-and-a-half months, and two years and one-and-a-half months before winning).

Petitioners argue that prolonged mandatory detention is more acceptable where the relief sought

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[5] Respondents use "substantial defenses to removal" to describe either a substantial defense to the charged ground of removability or eligibility for relief that will prevent entry of a removal order. The term does not include forms of relief, such as withholding of removal, that merely prevent the *execution* of a removal order to a particular country. The record here shows that 97% of Class members who sought relief had "substantial defenses to removal" under this definition. J.A. 94, tbl.22 (only 3% of Class members who applied for relief sought a form that would not prevent entry of a removal order, such as withholding). In *Demore*, this Court noted a legal distinction between a detainee's concession that he "is deportable," and a concession that he will "ultimately be deported." 538 U.S. at 523 n.6 (emphasis omitted); *see also* 8 C.F.R. 1208.16(f). The detainee in *Demore* sought only withholding of removal, and therefore did not have a substantial defense, as most Class members do.

is discretionary. Br. 41. However, whether relief is discretionary or mandatory is irrelevant to the purpose of detention. DHS lacks authority to remove individuals while they pursue substantial defenses, and those who prevail are never ordered removed. *See INS* v. *St. Cyr*, 533 U.S. 289, 307-08 (2001) (forms of relief "governed by specific statutory standards provide[] a right to a ruling on an applicant's eligibility" (internal quotes omitted)).

Under these circumstances, prolonged incarceration constitutes a serious deprivation of liberty that will often bear little or no relationship to effectuating a removal. *See Demore*, 538 U.S. at 531 (Kennedy, J., concurring) ("the ultimate purpose behind the detention is premised upon the alien's deportability").[6]

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[6] Petitioners have not argued that hearings under *Matter of Joseph*, 22 I&N Dec. 799, 801 (BIA 1999), satisfy the individualized custody hearing requirement, and any such argument would fail. *Joseph* hearings permit detainees to challenge whether they are properly subject to mandatory detention by showing that DHS's charges are "substantially unlikely" to prevail. *Id.* at 806. *Joseph* hearings do not consider danger and flight risk. They also do not consider whether the individual may obtain relief from removal. *Joseph* therefore does not ensure that prolonged detention remains reasonably related to its purpose. *See Demore*, 538 U.S. at 514 n.3 (declining to consider the adequacy of *Joseph* hearings).

The Court could avoid one aspect of the constitutional problem here by altering the *Joseph* standard. If the Court construed the phrase "is deportable" in Section 1226(c) to exclude those with substantial defenses, *i.e.*, those with a substantial challenge to the charges or those eligible for relief that would prevent entry of a removal order, then many Subclass members would no longer be "deportable" under Section 1226(c). *Demore*, 538 U.S. at 578 (Breyer, J., dissenting). *Cf.* 8 U.S.C. 1101(a)(47)(A) (using "deportable" to refer to final order mandating removal).

3. Petitioners' reading of *Demore* contradicts *Zadvydas*, which recognized that immigration detention, like other forms of non-punitive incarceration, must "bear a reasonable relation to [its] purpose." 533 U.S. at 690-91 (alterations omitted). The Court did not limit that principle to situations of "potentially permanent" detention. Indeed, *Zadvydas* relied on *Salerno*, which emphasized the requirement of individualized hearings in the pretrial context, which also involves detention of finite length. *See also Jackson*, 406 U.S. at 738 ("duration" of civil confinement must remain reasonable). The detention lengths here are comparable to those in *Zadvydas*. J.A. 72 (Class members detained over three and four years); *Casas-Castrillon* v. *Dep't of Homeland Sec.*, 535 F.3d 942, 945 (9th Cir. 2008) (seven-year detention).

Contrary to Petitioners' assertion, *Demore* did not "implicitly foreclose[]" a "*Zadvydas*-type rule," Br. 36, because the detainee did not argue that his detention was unauthorized because of its length or otherwise seek a rule just for prolonged detention cases. He argued that even brief detention without a custody hearing was unconstitutional, and the Court construed his petition as having conceded that the statute authorized his detention. 538 U.S. at 513-14. For that reason, *Demore*'s holding did not focus on prolonged detention or consider alternative statutory constructions. Even the Government suggested the Court need not address "prolonged detention," which "imposes a greater burden upon the alien." *See* Pet. Br. 48, *Demore*, No. 01-1491 (U.S. filed Aug. 29, 2002).

Although *Demore* is distinguishable for these reasons, should the Court disagree, it should overrule *Demore* because it rests on erroneous facts and failed

to require an individualized custody hearing as to danger and flight risk.

B. The Theoretical Possibility Of Habeas Corpus Relief In Cases Of Unreasonable Government Delay Does Not Satisfy Due Process.

Petitioners contend that detention always remains reasonable, and therefore requires no hearing, except in "rare" cases where the Government has unreasonably caused delay. Br. 47-48. They contend such instances are adequately addressed through habeas proceedings. Petitioners' position disregards the factual record and is contrary to this Court's due process precedents.

1. Every court of appeals to consider it has rejected Petitioners' draconian view that all mandatory detention necessarily remains reasonable in relation to its purpose if the delay is caused by the time needed for individuals to litigate their cases, regardless of detention length. *Compare* Br. 39-40, *with Sopo* v. *U.S. Attorney Gen.*, 825 F.3d 1199, 1218 (11th Cir. 2016); *Ly* v. *Hansen*, 351 F.3d 263, 272 (6th Cir. 2003); *Chavez-Alvarez* v. *Warden York Cty. Prison*, 783 F.3d 469, 476 (3d Cir. 2015); *Reid* v. *Donelan*, 819 F.3d 486, 500 n.4 (1st Cir. 2016). The lengthy detention of people pursuing substantial defenses often does not serve the statute's purpose.

Furthermore, the record refutes Petitioners' claim that individuals are responsible for the length of detention. Petitioners have structured immigration proceedings so as to *require* detainees to seek multiple "adjournments" to present their defenses. J.A. 307-09. *See generally* J.A. 496 (Government categorizes rescheduled hearings as "adjournments"). Under Petitioners' system, the first scheduled

hearing is a "master calendar," akin to a criminal arraignment; the only way to resolve a case at that hearing is to give up. Applying for forms of relief requires at least one and usually multiple further hearings, because court rules require a separate date to submit the application and then at least one other for merits hearings. J.A. 307-09; J.A. 287-88; Ex. B § 3.1(b)(iii)(A), ECF No. 319; Decl. of Cody Jacobs Ex. E, Fong Dep. at 130:17-25, ECF No. 291. Petitioners fault Class members for adjournments even where *required* to pursue claims, or where the Government is ultimately responsible for the delay. J.A. 147 (classifying as "alien-caused" adjournments taken because DHS is adjudicating petition); J.A. 32-33 (named Plaintiff Perez-Ruelas detained for over a year while DHS processed and granted I-130 petition).

Detainees who request adjournments also have no control over their *length*. Crowded dockets cause lengthy adjournments, as comparisons across different time periods and detention centers confirms. Decl. of Michael Tan Ex. D, Palmer Dep. at 79:25-80:6, ECF No. 283 (Petitioners' expert acknowledging that pattern of forty-day continuances suggests length driven by court scheduling); Decl. of Talia Inlender ¶¶ 4, 6, ECF No. 252-1 (documenting case where IJ continued matter for four months and denied motion to shorten continuance); Decl. of Susan Long Ex. C, ECF No. 281-6 (tables showing substantial historical and geographic variation in case processing times for comparable detainee populations within Central District); Opp'n to Defs.' Statement 2, ECF. No. 313.[7]

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[7] Contrary to Petitioners' suggestion, Br. 43, the Ninth Circuit enforces the regulatory requirement that a continuance should be granted only for "good cause," and provides IJs ample leeway

Class members also do not control how long the BIA and circuit courts take to resolve appeals. *See* J.A. 76 (average detention length nearly 15 months for Class members with BIA appeals; over 22 months for those with petitions for review).[8]

2. Petitioners' position also misunderstands the due process precedents requiring an individualized custody hearing. Petitioners cite no civil detention case where this Court has excused the Government from complying with the custody hearing requirement because a court could grant habeas relief. As the Eleventh Circuit explained, "[t]he constitutional principles . . . apply to the government's conduct—detaining criminal aliens—whether a § 2241 petition is filed or only potentially forthcoming. The government is constitutionally obligated to follow the law . . . ." *Sopo*, 825 F.3d at 1217 n.8. In other civil detention contexts, this Court has made clear that due process obligations exist separate and apart from habeas corpus. *See, e.g.*, *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 525 (2004) (plurality) (setting forth distinct due process hearing requirements even though "[a]ll agree suspension of the writ has not occurred here").[9]

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to deny continuances. *E.g.*, *Sandoval-Luna* v. *Mukasey*, 526 F.3d 1243, 1247 (9th Cir. 2008) (per curiam) (upholding denial of second continuance).

[8] Petitioners seek support for their view from *Demore*'s rejection of the argument that mandatory detention is impermissible because it deters appeals. 538 U.S. at 530 n.14. But it does not follow that all of the time detainees spend incarcerated while pursuing defenses is necessarily reasonable, regardless of its length, the strength of the defense, and other circumstances.

[9] After *Zadvydas* set forth the applicable constraints on detention authority in that context, the Government amended

Petitioners also suggest that habeas suffices because only the "rare" individual will win release in a hearing. The record refutes this; roughly 70% of Class members are found eligible for release at hearings. J.A. 528-29. Furthermore, Petitioners' argument turns the due process rule on its head. That some subset of individuals will be denied release after a hearing on danger and flight risk does not undercut the principle that all must be afforded that hearing.

3. Imposing a requirement that Class members file a habeas petition also fails to remedy the constitutional violation arising from prolonged detention without hearings because it effectively robs many detainees of any opportunity for detention review. "[D]etainees, who typically have no choice but to proceed *pro se*, have limited access to legal resources, often lack English-language proficiency, and are sometimes illiterate." App. 48a; *cf.* App. 143a (finding that the "bond hearing process would be fraught with peril if the Court were to place the burden on detainees to request a bond hearing").

For those who do file, district courts often take months to decide petitions, in part because courts must familiarize themselves with a previously-unknown removal case, all to decide whether to order a bond hearing where an IJ will reconsider largely the same evidence. *Reid*, 819 F.3d at 498 ("the federal courts' involvement is wastefully duplicative").

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its review procedures to comply with those procedural and substantive constraints. *E.g.*, 8 C.F.R. 241.4(k)(1)(ii), 241.13.

C. There Is No Exception To The Prohibition On Prolonged Detention Without Hearings For Arriving Subclass Members.

Petitioners make a specific argument that applies only to the Arriving Subclass, contending that the parole review process satisfies constitutional requirements because individuals who presented themselves at the border have no right to liberty. The Court should reject Petitioners' position, because this Court's due process doctrine does not permit Subclass members' liberty to be left entirely to the arbitrary decisions of DHS officers.

1. All Arriving Subclass members—noncitizens litigating in full removal proceedings, most of whom are asylum seekers who have been found to have a credible fear of persecution—are "persons" who retain Fifth Amendment rights against arbitrary imprisonment. "[C]ivil commitment *for any purpose* constitutes a significant deprivation of liberty." *Addington*, 441 U.S. at 425 (emphasis added); *see also Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting) ("both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious"); *Rosales-Garcia* v. *Holland*, 322 F.3d 386, 408 (6th Cir. 2003) (en banc) (finding serious constitutional problems with indefinite detention of excludable noncitizens).

This Court requires hearings where far lesser interests are at stake. *E.g.*, *Goldberg* v. *Kelly*, 397 U.S. 254, 268 (1970) (failure to provide in-person hearing prior to termination of welfare benefits was "fatal to the constitutional adequacy of the procedures"); *Califano* v. *Yamasaki*, 442 U.S. 682,

696 (1979) (in-person hearing required for recovery of excess Social Security payments).[10]

2. Petitioners suggest these basic principles are inapplicable to Arriving Subclass members under *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), but *Mezei* does not permit the prolonged arbitrary detention of Subclass members, for three reasons.

First, though it mentioned the Government's power to detain, *Mezei* primarily concerned the power to exclude. The detainee was "denied entry" and had lost his case. *Id.* at 212. In contrast, all Subclass members have been referred for full removal hearings; 97% have substantial defenses to removal, and two thirds of them will win their cases. J.A. 98, tbl.28; J.A. 135, tbl.38; App. 40a. Thus, they have *not* "been determined to be removable after a fair hearing under lawful and proper procedures," *Zadvydas*, 533 U.S. at 718 (Kennedy, J., dissenting), and the great majority never will be.

Whatever *Mezei* establishes about the Government's power to summarily exclude arriving noncitizens, it does not hold that those who are *not* being summarily removed have no rights against arbitrary detention. The Government has no legal authority to remove Arriving Subclass members unless and until they lose their cases, which most

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[10] International law further supports custody hearings, because it prohibits arbitrary detention. *See Zadvydas*, 533 U.S. at 721-22 (Kennedy, J., dissenting). At a minimum, individuals are entitled to "adequate procedures to review their cases." *Id.* That international law requires procedures more robust than those afforded by the parole review process also counsels in favor of Respondents' interpretation of the statute. *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

never will. Although they have no permanent right to remain, they do have a right to be free from arbitrary "physical restraint," *Zadvydas*, 533 U.S. at 690, while their cases remain pending.[11]

Second, *Mezei*'s detention holding rests on national security considerations not present in this case. *Mezei* authorized prolonged detention because "to admit an alien barred from entry *on security grounds* nullifies the very purpose of the exclusion proceeding." 345 U.S. at 216 (emphasis added). That rationale does not apply here. Releasing those Subclass members who pose no flight risk or danger would not *itself* defeat the purpose of removal proceedings, and there is no suggestion that it would threaten national security. *Cf. Jean* v. *Nelson*, 472 U.S. 846, 854-55 (1985) (construing parole regulation to prohibit race discrimination and therefore not deciding whether *Mezei* applied); *see also id.* at 859, 872-74 (Marshall, J., dissenting) (disagreeing with majority for failing to decide constitutional issue, and concluding that *Mezei* was inapplicable because "the narrow question decided in . . . *Mezei* was that the denial of a hearing in a case in which the Government raised national security concerns did not violate due process").

Third, *Mezei* predates this Court's civil detention precedents, *see supra* Point I.A., and, in particular,

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[11] Contrary to Petitioners' assertions, Br. 20, the *Mezei* dissenters did not agree either that Mr. Mezei could be detained without a custody hearing or that he could be held for whatever period necessary to effectuate his exclusion, no matter its length. *Mezei*, 345 U.S. at 227 (Jackson, J., dissenting) (concluding that Mezei's detention could be enforced only through procedures "which meet the test of due process of law"); *id.* at 217 (Black, J., dissenting) ("I join MR. JUSTICE JACKSON in the belief that Mezei's continued imprisonment without a hearing violates due process of law.").

Zadvydas' application of them to hold that even an individual who had lost the right to "live at large" in this country retained an interest in "[f]reedom from . . . physical restraint." 533 U.S. at 690, 696. Released Subclass members can be subject to forms of intensive supervision that significantly restrain their liberty in order to ensure their appearance, if removal ever becomes legally authorized. *See id.* at 695-96 ("The choice, however, is not between imprisonment and the alien 'living at large.'").

3. The Government's parole review process for the Arriving Subclass is not an adequate substitute for an IJ hearing because, as the record demonstrates, it gives rise to prolonged arbitrary detention. Prior to the injunctions in this case, Petitioners detained Arriving Subclass members without hearings for an average of nearly one year, J.A. 97, tbl.27; App. 40a, even though a large majority win their cases and virtually all have no criminal history. J.A. 98, tbl.28; J.A. 135, tbl. 38; J.A. 328; App. 20a, 40a.

No other detention regime permits the jailing authority to impose months or years of incarceration simply by checking a box on a form that provides no explanation, reflects no deliberation, and includes no hearing, no record, and no appeal. J.A. 225-26; App. 39a. Respondents uncovered extensive evidence of arbitrary detention resulting from the flawed parole review process.

For example, a Somali asylum seeker fled his country after both of his brothers were killed in political violence. He had no criminal history in any country. He passed his credible fear interview, established his identity, and passed security checks required by regulations. Yet DHS denied release on parole by checking the box for flight risk. They

provided him no other explanation. Eight months after his detention began, an IJ granted him asylum, but he remained detained because DHS reserved appeal. The appeal lasted seven more months (including additional time for an extension that DHS obtained). He won release only after prevailing on appeal, after 15 months of pointless incarceration, for which he never received any explanation. J.A. 234-35.

Another Subclass member was denied release based on documents that referred to the wrong detainee; he was ultimately detained for over ten months without a bond hearing, and released only after he won asylum. J.A. 234. In other cases, DHS officers used some detainees as translators and recommended denying parole because the interviewees allegedly asked to remain incarcerated. J.A. 235. In other cases, officers ignored material evidence, leading to further pointless detention. J.A. 227-28; *see also Nadarajah* v. *Gonzales*, 443 F.3d 1069, 1071 (9th Cir. 2006) (arriving asylum seeker detained four and a half years while case pending, despite repeatedly winning asylum before IJ).

The record establishes that the parole process lacks any meaningful opportunity for detainees to be heard and any mechanism to catch even manifest errors. It results in months, and sometimes years, of pointless incarceration. J.A. 334-35, 339. *See generally* J.A. 226-35; App. 39a-40a.

4. Petitioners' detention review procedures are also unconstitutional as to LPRs returning from brief travel abroad, who clearly remain "person[s] within the protection of the Fifth Amendment" entitled to the full protections of the Due Process Clause. *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 596 (1953); *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982) (LPR

accused of crime while abroad entitled to due process in exclusion proceedings).

Petitioners assert that only a few LPRs are detained under Section 1225(b), but Petitioners forfeited this argument in district court. They never disputed either the prevalence of returning LPRs in the Subclass or the status of the returning LPR identified in the record. J.A. 276. The Government has consistently applied Section 1225(b)(2)(A) to deny bond hearings to LPRs returning from brief travel, and courts regularly decide cases about such individuals. *E.g.*, *Vartelas* v. *Holder*, 132 S. Ct. 1479, 1485 (2012).[12]

Petitioners contend that returning LPRs classified by statute as "seeking admission" may be treated as first-time entrants for constitutional purposes. Br. 27-28. That position is foreclosed by *Landon*, which applied due process protections in exclusion proceedings to a returning LPR, even though she was, as a statutory matter, subject to exclusion proceedings because of alleged unlawful conduct abroad. 459 U.S. at 32-36. *Accord Kwong Hai Chew*, 344 U.S. at 600; *Mezei*, 345 U.S. at 213-14.

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For these reasons, the Due Process Clause does not permit the prolonged detention of Class members without individualized custody hearings.

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[12] *Bautista* v. *Sabol*, 862 F. Supp. 2d 375, 377-78, 381 (M.D. Pa. 2012) (LPR detained more than 2 years); *Arias* v. *Aviles*, No. 15-CV-9249 (RA), 2016 WL 3906738, at *7 (S.D.N.Y. July 14, 2016) (LPR treated as seeking admission because of criminal activity while abroad), *appeal filed*, No. 16-3186 (2d Cir. Sept. 12, 2016).

II. THE IMMIGRATION DETENTION STATUTES DO NOT AUTHORIZE CLASS MEMBERS' PROLONGED DETENTION WITHOUT CUSTODY HEARINGS.

The Court need not decide the constitutional issues, because a "fairly possible" construction of the detention statutes is available that avoids these serious constitutional concerns. *Zadvydas*, 533 U.S. at 689. Petitioners contend that the Court should not apply the avoidance canon because constitutional problems under the statute will be "rare." Br. 15. The record shows such cases are common, and in any event, Petitioners cite no authority for the premise that the avoidance canon gives way where the percentage of cases presenting a constitutional problem dips below some imaginary limit. Alternative constructions must be sought when "one of the statute's applications" raises constitutional concerns, even if other applications "would not support the same limitation." *Clark* v. *Martinez*, 543 U.S. 371, 380 (2005). As explained below, such constructions are available.

None of the statutes at issue here authorizes prolonged mandatory detention. Section 1226(c) authorizes detention for only a reasonable six-month period of time, after which detention authority derives from Section 1226(a), the default statute governing detention "pending a decision on whether the alien is to be removed." Sections 1225(b)(1)(B)(ii) and 1225(b)(2)(A) authorize detention only prior to the commencement of removal proceedings, after which detention is also governed by Section 1226(a). And even if Section 1225(b)'s provisions apply to pending proceedings, they too authorize detention for only a reasonable six-month period.

A. Section 1226(c) Authorizes Mandatory Detention For Only A Six-Month Period, After Which Section 1226(a) Governs.

Petitioners read Section 1226(c) to authorize unlimited detention without review. All six circuits to consider the issue have rejected that interpretation, and instead construed it to contain an implicit reasonableness limitation after which the Government must justify continued detention at a bond hearing. *Sopo*, 825 F.3d at 1212-13 (collecting cases).

The absence of any temporal limit in Section 1226(c), coupled with the specific authorization for detention beyond six months with limited review in the Patriot Act, shows that Congress did not clearly intend to authorize prolonged mandatory detention under this statute. Adopting a six-month rule also comports with this Court's use of similar rules of administrability in other contexts.

1. Section 1226(c) Does Not Clearly Authorize Mandatory Detention Beyond Six Months.

1. Section 1226(c)(1) provides that the Government shall take certain noncitizens into custody for removal proceedings, but does not say for how long. Under *Zadvydas*, that silence cannot be construed to authorize prolonged mandatory detention, because Congress must use "clearer terms" to authorize "long-term detention." 533 U.S. at 697.

Section 1226(c)(2)'s narrow authorization for the discretionary release of certain individuals when necessary to protect a witness does not "clearly demonstrate[]" that Congress intended Section 1226(c)(1) to authorize prolonged mandatory detention of all others. *Id.* at 699. The detention

statute in *Zadvydas* contained an express exception requiring release of certain individuals after ninety days, but *Zadvydas* nonetheless read a neighboring provision to contain an implicit six-month limit. *Compare* 8 U.S.C. 1231(a)(3) (requiring release for some noncitizens not removed after 90 days), *with* 1231(a)(6) (authorizing detention "beyond" that period for others).

2. Congress' response to *Zadvydas* underscores that Section 1226(c) does not clearly authorize prolonged mandatory detention. Four months after *Zadvydas*, Congress explicitly authorized prolonged detention under specialized review procedures for national security detainees in the Patriot Act (8 U.S.C. 1226a).

The Patriot Act shows that Congress speaks clearly when it intends to authorize prolonged detention with only limited review. Section 1226a(a)(3) authorizes the Attorney General to certify someone as a security threat. Section 1226a(a)(2) specifies that she "shall maintain custody of" such individuals "until the alien is removed." Section 1226a(a)(7) provides for automatic review of those certifications every six months by high-level Department of Justice officials. *See also id.* 1226a(a)(3)-(4) (limiting scheme to national security detainees and constraining delegation of authority), 1226a(a)(6) (authorizing post-order detention beyond six months even where removal is not reasonably foreseeable).

Petitioners' interpretation of Section 1226(c) would render the Patriot Act superfluous. On Petitioners' view, the Government *already* had broader authority to detain individuals as national security threats under Section 1226(c)(1)(D), which applies to individuals charged on national security grounds, than Congress later provided in the Patriot Act.

Compare 8 U.S.C. 1226(c)(1)(D), *with id.* 1226a(a)(3)(A). Moreover, on Petitioners' view, Congress provided *less* authority to detain national security threats under the Patriot Act than those with minor criminal convictions detained under Section 1226(c); the Patriot Act requires periodic supervisory review of prolonged mandatory detentions, whereas Petitioners believe Section 1226(c) authorizes prolonged detention without any review.

As a subsequently-enacted statute that specifically addresses prolonged detention, the Patriot Act provides an important tool for interpreting Section 1226(c).

> At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings . . . . This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand.

FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000); *United States* v. *Fausto*, 484 U.S. 439, 453 (1988) ("the implications of a statute may be altered by the implications of a later statute").

3. Legislative history does not support Petitioners' claim to unlimited mandatory detention authority. At the time of Section 1226(c)'s passage, detained cases "were given priority in the immigration system," the "average stay [was] 28 days," and the legislation of which it was part sought to further "streamline[]" removal proceedings. H.R. Rep. No. 104-469, pt. 1, at 108, 123. The history nowhere shows that Congress intended to authorize prolonged mandatory detention.

2. This Court's Precedents Establish The Need For An Administrable Six-Month Rule.

The Ninth Circuit also properly applied this Court's precedents adopting administrable rules in other due process contexts to require an IJ hearing after six months. That requirement protects the significant liberty interests at stake and conserves judicial resources. In contrast, Petitioners' approach suffers from severe practical problems evident from the record below and over a decade of experience in the lower courts.

1. This Court often has emphasized the benefits of bright-line rules in ensuring efficient compliance with limits on state authority. It has imposed them even where there are no underlying statutory time limits. *Maryland* v. *Shatzer*, 559 U.S. 98, 110 (2010) (14-day limit in interrogation context because "case-by-case adjudication" would be "impractical"); *Cty. of Riverside* v. *McLaughlin*, 500 U.S. 44, 55-56 (1991) (48-hour limit on detention prior to probable cause hearing "reasonable" to "provide some degree of certainty" that States are acting "within constitutional bounds"); *United States* v. *Thirty-Seven (37) Photographs*, 402 U.S. 363, 372-74 (1971) ("read[ing] explicit time limits" into federal forfeiture statute due to concerns about unconstitutional delays in some cases).[13]

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[13] Even the circuits that rejected a six-month rule acknowledged the uncertainty generated by the lack of guideposts, leading some to suggest alternative time periods. *Chavez-Alvarez*, 783 F.3d at 477 n.11, 478 (between six months and one year); *Sopo*, 825 F.3d at 1217 (by one year); *cf. Reid*, 819 F.3d at 497 (habeas enforcement approach "has resulted in wildly inconsistent determinations"). Respondents have preserved a request for relief other than a six-month rule. J.A.

2. All three Branches have used six months as a guidepost in cases involving prolonged confinement. Congress repeatedly has utilized it in the immigration detention context. 8 U.S.C. 1226a(a)(6), (a)(7), 1537(b)(2)(C). The Executive has done the same. 8 C.F.R. 241.14(k)(1)-(3) (providing for IJ review every six months for specially dangerous post-order detainees whose removal is not significantly likely).

Most important, this Court recognized that time period in *Zadvydas*, which imposed a six-month presumptive limit on detention of individuals ordered removed because "Congress previously doubted the constitutionality of detention for more than six months" in that context. 533 U.S. at 701. This Court also has adopted six months as a "useful benchmark" in other contexts involving confinement. *McNeil*, 407 U.S. at 250 (civil commitment); *Cheff* v. *Schnackenberg*, 384 U.S. 373, 379-80 (1966) (plurality) (six month limit for sentences imposed without jury trial adopted so courts are not "at sea" in applying the rule). Adopting such a rule here would be entirely consistent with *Zadvydas*, which established six months as the triggering point for an *inquiry* into the need for detention, not automatic release. *Compare* Br. 38.

Petitioners claim the Court has rejected bright-line rules in the Speedy Trial context, Br. 42-43 (citing *Barker* v. *Wingo*, 407 U.S. 514 (1972)), but a speedy trial violation results in dismissal of the indictment and *release*. *See Strunk* v. *United States*, 412 U.S. 434, 440 (1973). The question here is when *a hearing* should occur.

41-42; Pet. Opp. To Resp't's 12(c) Mot. For Judg. On The Pleadings 2, 16-18, ECF No. 149.

3. There is no merit to Petitioners' assertion that providing custody hearings to Mandatory Subclass members contravenes Congress' goal of reducing recidivism and flight risk for deportable noncitizens. Br. 32. The injunction permits detention of those who pose such risks. The Ninth Circuit did not order anyone released, set a "cap" on detention beyond six months, Br. 38, or adopt a "one size fits all" approach, Br. 39. It set the time for *a hearing*. A third of Class members—those found to present a risk or cannot post bond—remain detained after the hearing. J.A. 528, fig.1.

Petitioners also ignore the record evidence illustrating that many individuals released through hearings pose no danger. For example, one Class member entered on a valid visa and lived here for seventeen years, during which he established a small business. But he was detained for over two years as a danger, even though his sole conviction was for being under the influence of a controlled substance, for which he received a 90-day sentence suspended to four days (along with a substance abuse program requirement). When he received a custody hearing, the IJ ordered him released on five thousand dollars bond. J.A. 244-46; *see also* J.A. 260-62 (detainee held over two years based on a single marijuana possession offense, released on bond after IJ hearing).[14]

Ignoring this record evidence, Petitioners cite decades-old flight and recidivism data from *Demore*, but that data concerns "deportable criminal aliens," Br. 32, not individuals detained for prolonged periods

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[14] The hearings in these cases were held pursuant to decisions issued prior to *Rodriguez* that required IJ bond hearings under standards similar to those required by *Rodriguez*.

while litigating substantial defenses, who therefore are less likely to present a risk of danger or flight.

Petitioners also ignore substantial changes to the immigration detention system over the last twenty years. Prior to 1996, the Government routinely released individuals or set low bonds to clear bed space, raising concerns in Congress that individuals who might otherwise be detained were released irrespective of danger or flight risk. S. Rep. No. 104-48, at 2 (1995) (INS "often refuse[d]" to take custody over criminal noncitizens "because of limited detention space.").

Since that time, DHS has increased its detention capacity dramatically and, as the record here demonstrates, developed alternatives to detention that have proven effective in preventing danger and flight, reducing the need for detention. For example, the Intensive Supervision Appearance Program (ISAP) employs alternatives such as electronic monitoring that, according to Respondents' own witness, achieve compliance rates approaching 100%. *See* J.A. 564-65 (compliance with ISAP "[is] at, if not close to, 100 percent . . . for people [going] to their immigration court hearing pre-order" in the San Bernardino area, and at 90% for Los Angeles area as a whole); J.A. 380 (in 2010, ISAP's "full service" option produced 99% attendance rate at all hearings and a 94% attendance rate at the final court decision); J.A. 432-33 (in 2011, 99.4% for all hearings and 96% at final decision); J.A. 449 (during 2011, less than 1% of participants in ISAP were terminated due to arrest by another law enforcement agency).

The remainder of Petitioners' arguments regarding danger and flight risk rest on extra-record citations, submitted for the first time to this Court, purportedly demonstrating that "flight and recidivism remain

serious concerns." Br. 33-34. Petitioners had every opportunity to submit information on these points during the two-year discovery period.

The source for Petitioners' assertion that individuals released on bond abscond 41% of the time was rejected as unreliable when Petitioners sought judicial notice of it before the Ninth Circuit. Req. for Judicial Notice Order 6-7, ECF No. 133. That statistic is irrelevant and flawed. It includes the large number of individuals released on bond by DHS without the benefit of custody hearings. It has no bearing on the appearance rates of Class members, who are released only after hearings where IJs are required to consider imposing intensive supervision methods.

The statistic is also flawed. A different study of the same time period that focuses on individuals released after IJ bond hearings shows that 86% of individuals released by IJs appear for proceedings.[15] Even this number, which includes *all* IJ bond hearings, likely underestimates the rate at which Class members appear, given the extremely high success rate of intensive supervision programs. *See* J.A. 380; *see also* App. 53a.

The Court should also disregard Petitioners' extra-record cite to a newspaper article about recidivism. Br. 34. Even without access to the underlying data, Respondents can identify numerous flaws, including that it concerns people released because they could not be repatriated, rather than because they were found at a hearing to present no danger; it is not from a study, but instead the reporter's selection of 323 cases that may not be representative even of that

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[15] TRAC Immigration, *What Happens When Individuals Are Released On Bond In Immigration Court Proceedings?* (Sept. 14, 2016), http://trac.syr.edu/immigration/reports/438/.

group; and it does not define recidivism, and therefore could include people arrested for minor infractions.[16] The Ninth Circuit rejected Petitioners' request for notice of two similar articles on recidivism as unreliable. Req. for Judicial Notice Order 6, ECF No. 133.

The well-developed record below refutes Petitioners' claim that the injunction contravenes Section 1226(c)'s intended purpose.

B. Section 1225(b) Does Not Authorize Subclass Members' Detention.

Only two provisions of Section 1225(b) are at issue here: Sections 1225(b)(1)(B)(ii) and 1225(b)(2)(A). Unlike most individuals subject to detention under Section 1225(b), who face expedited removal under other subsections of Section 1225(b), individuals detained under these two provisions have been referred for full removal proceedings before an IJ. Individuals detained under Section 1225(b)(1)(B)(ii) are asylum seekers who presented themselves at the border *and* were found by an asylum officer to have a credible fear of persecution warranting consideration in a full removal proceeding. Those detained under Section 1225(b)(2)(A) include LPRs returning from brief travel abroad who did not prove their right to admission "beyond doubt" and therefore were referred for removal proceedings.

Neither Section 1225(b)(1)(B)(ii) nor (b)(2)(A) authorizes detention once an individual is in removal proceedings. Both address only the period between

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[16] *See* Maria Sacchetti, *Timeline of the Globe's lawsuit*, Bos. Globe (June 5, 2016), https://www.bostonglobe.com/Bmetro/2016/06/04/timeline-globe-lawsuit/fjfhSlro4lJU0C04ZSKaOM/story.html

apprehension at the border and initiation of removal proceedings. Once proceedings have begun, detention is governed by Section 1226(a), which authorizes detention "pending a decision on whether the alien is to be removed." Regulations implementing that statute permit the IJ to decide whether an individual should be released on bond.

Even if Sections 1225(b)(1)(B)(ii) and 1225(b)(2)(A) were construed to apply during removal proceedings, they are silent as to the permissible length of detention, and therefore do not authorize prolonged detention without hearings.

Treating Arriving Subclass members like other individuals in removal proceedings, including those apprehended after crossing the border without inspection, does not undermine border security. It simply recognizes the distinction Congress already drew between most individuals arriving at the border (who are subject to expedited removal) and the small subset of screened-in asylum seekers and other noncitizens who have been referred for full removal proceedings. Congress did not require such individuals to be subject to arbitrary detention.

1. Section 1225(b) Authorizes Detention Only For The Period Before A Noncitizen Is Placed In Removal Proceedings, After Which Section 1226(a) Governs.

1. The two subsections of Section 1225(b) at issue here—Section 1225(b)(1)(B)(ii) and Section 1225(b)(2)(A)—are parallel provisions that govern detention of noncitizens who present themselves at the border only for the brief period before the initiation of removal proceedings. Individuals screened in and permitted to pursue asylum claims

are detained under Section 1225(b)(1)(B)(ii) "*for* further consideration of the application for asylum." (emphasis added). Likewise, returning LPRs are detained under Section 1225(b)(2)(A) "*for* a [removal proceeding]." (emphasis added). Neither provision governs detention *beyond* that point, i.e., once removal proceedings begin. *See Webster's Third New International Dictionary* 886 (1993) (defining "for" to mean "as a preparation toward . . . or in view of").

In contrast, where Congress intended to authorize detention *pending* completion of proceedings, it said so—including in Section 1225(b)(1)(B)(iii)(IV), which provides "[the] alien . . . shall be *detained pending* a final determination of credible fear of persecution and, if found not to have such a fear, *until removed*." (emphases added).

"[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Nken* v. *Holder*, 556 U.S. 418, 430 (2009). This is "particularly true" where, as here, the provisions at issue were "enacted as part of a unified overhaul" of the statute. *Id.* at 430-31.[17]

2. Petitioners' practice of providing custody hearings to individuals who have entered without

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[17] Respondents had no occasion to press this construction *below because the Ninth Circuit had already construed Section* 1225(b) not to authorize prolonged detention without hearings. App. 90a. In any event, this Court's "traditional practice" is to "refus[e] to decide constitutional questions when the record discloses other grounds of decision, whether or not they have been properly raised before us by the parties." *Neese* v. *S. Ry.*, 350 U.S. 77, 78 (1955) (per curiam); *accord Rosenberg* v. *Fleuti*, *374 U.S. 449, 451 (1963).*

inspection fatally undermines their construction of Section 1225(b). *See Matter of X-K-*, 23 I&N Dec. at 734. Such individuals are, like Class members, initially detained under Section 1225(b)(1)(B)(ii), because they are classified by statute as applicants for admission. 8 U.S.C. 1225(a)(1), (b)(1)(A)(iii). However, as Petitioners acknowledge, once put in removal proceedings, they become entitled to custody hearings under Section 1226(a) and subject to "the general custody authority of section [1226]." Br. 18 n.5. Because Section 1225(b) does not distinguish between applicants for admission who presented themselves at the border and those who have entered without inspection, it must be construed consistently to provide custody hearings to both groups.

3. Respondents' interpretation better comports with the statute's purpose. To the extent the injunction has any incentive effect on people fleeing persecution, it *encourages* them to present themselves at the border rather than enter without inspection. Furthermore, the injunction has no effect on the vast majority of individuals stopped at the border; they are still summarily returned to their country of origin. It permits release only of the small minority referred for full removal proceedings, detained for six months, and found by an IJ to present no danger or flight risk. Neither Section 1225(b)'s text nor its purpose suggests that Congress intended such individuals to be subject to prolonged arbitrary detention. Instead, once individuals are referred for removal proceedings to resolve their asylum claims or applications for admission, their detention is governed by Section 1226(a). That section, which generally covers detention pending proceedings, permits bond hearings.

4. Petitioners assert that providing custody hearings to Subclass members violates the parole statute, Br. 17, but nothing in its text supports that claim. Section 1182(d)(5)(A) nowhere states that it constitutes the exclusive means of releasing arriving noncitizens, let alone those in removal proceedings. Indeed, habeas courts historically granted release to noncitizens pending exclusion proceedings despite the availability of parole or its precursors. *E.g.*, *Ex parte Joyce*, 212 F. 285, 287 (D. Mass. 1913); *Ex parte Tsuie Shee*, 218 F. 256, 259 (N.D. Cal. 1914); *cf. Gegiow* v. *Uhl*, 239 U.S. 3, 9 (1915) ("[W]hen the record shows that a commissioner of immigration is exceeding his power, the alien may demand his release upon *habeas corpus*.").

5. Petitioners next argue that Respondents' interpretation contradicts 8 C.F.R. 1003.19(h)(2)(i)(B), which bars IJs from reviewing the custody of "[a]rriving aliens in removal proceedings." Br. 18. If true, the regulation contravenes the statute. Section 1226(a) provides that the "*Attorney General* . . . may continue to detain the arrested alien" or "release the alien on . . . bond . . . or . . . conditional parole." 8 U.S.C. 1226(a)(2) (emphasis added). Although that power is shared with the Secretary of Homeland Security, 6 U.S.C. 202, 251, 291, the Attorney General (under whom IJs work) retains ultimate authority to determine whether to release. 8 U.S.C. 1103(a)(1); *Matter of Garcia-Garcia*, 25 I&N Dec. 93, 97 (BIA 2009). Thus, if the regulation bars IJs from reviewing DHS custody determinations for arriving noncitizens detained under Section 1226(a), it violates the statute. *Cf. Union Pac. R.R.* v. *Bhd. of Locomotive Eng'rs*, 558 U.S. 67, 71 (2009) (an agency "directed by Congress to adjudicate particular

controversies" may not "decline to exercise [jurisdiction]").

Furthermore, this Court owes no deference to agency regulations that raise serious constitutional concerns. *See Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 574-75 (1988). The regulation should not be read to give the jailing authority unreviewable power to subject Subclass members to prolonged incarceration. *Cf. Kwong Hai Chew*, 344 U.S. at 598-99, 601-02.[18]

2. Even If Section 1225(b) Governs While Removal Proceedings Are Pending, It Does Not Clearly Authorize Detention Without Hearings Beyond Six Months.

Even if this Court rejects the construction offered above and holds that Section 1225(b)(1)(B)(ii) and (b)(2)(A) continue to govern detention pending removal proceedings, those provisions should not be construed to require prolonged detention without custody hearings.

As set forth above, Arriving Subclass members who are returning LPRs cannot be subjected to prolonged

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[18] Petitioners argue—without substantiation—that the possibility of release after six months undermines the visa and inadmissibility laws and promotes unauthorized employment. Br. 22-24. Nothing in this case implicates the inadmissibility provisions because an individual released from detention is not thereby admitted under the immigration laws. *Cf. Zadvydas*, 533 U.S. at 695. As for employment, Subclass members who seek asylum or who are LPRs may already be eligible to work regardless of detention status, *see* 8 C.F.R. 274a.12(c). If any Arriving Subclass members cannot work upon release, their economic effect is minimal compared to the far larger number of border crossers to whom Petitioners already provide bond hearings.

detention without a custody hearing. Thus, to avoid the constitutional problem, the phrase "shall be detained for [a removal proceeding]" in Section 1225(b)(2)(A) should be read to include an implicit six-month reasonableness limitation for LPRs. *See* App. 40a-45a, 88a-95a.

It follows that the materially identical phrase in Section 1225(b)(1)(B)(ii), which applies to asylum seekers, should be construed consistently. *See Sullivan* v. *Stroop*, 496 U.S. 478, 484 (1990) ("identical words used in different parts of the same act are intended to have the same meaning"); *see also infra* III.B.[19]

Thus, this Court may avoid the constitutional problem by adopting the Ninth Circuit's construction of Section 1225(b).

III. THE COURT OF APPEALS PROPERLY ORDERED CERTAIN PROTECTIONS AT PROLONGED DETENTION CUSTODY HEARINGS.

For over a century, this Court has construed the immigration statutes to include procedural protections necessary to avoid constitutional problems. *E.g.*, *Yamataya*, 189 U.S. at 101; *Wong Yang Sung*, 339 U.S. at 50. This Court should follow its precedents that "readily construe[] statutes that authorize deprivations of liberty . . . to require that the Government give affected individuals . . . protections

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[19] Petitioners suggest that returning LPRs could be exempt from Section 1225 through a new reading of Section 1101(a)(13), *see* Br. 29 n.9, but their proposal is contrary to the BIA's holding that Section 1101(a)(13) "specifies . . . the circumstances under which a LPR *will* be regarded as seeking an admission." *Matter of Collado-Munoz*, 21 I&N Dec. 1061, 1064 (BIA 1998) (emphasis added)); *see also* App. 44a.

essential to assuring procedural fairness," by reading Section 1226(a) to include certain protections. *Burns* v. *United States*, 501 U.S. 129, 137-38 (1991) (collecting cases).

To satisfy due process requirements, the Ninth Circuit correctly held prolonged detention custody hearings under Section 1226(a) should require (1) the Government to bear the burden of proof by clear and convincing evidence; (2) consideration of the length of detention in determining whether it remains justified; and (3) periodic hearings every six months.

A. Due Process Requires The Government To Justify Prolonged Detention By Clear And Convincing Evidence.

1. Given that prolonged immigration detention constitutes such a significant deprivation of liberty as to require a custody hearing, *see supra* Point I, the Government must bear the burden at that hearing to show, by clear and convincing evidence, why continued detention is justified. When the Government seeks to deprive an individual of a "particularly important individual interest[]," *Addington*, 441 U.S. at 424, it bears the burden of proof by clear and convincing evidence. *Santosky* v. *Kramer*, 455 U.S. 745 (1982) (parental termination); *Addington*, 441 U.S. at 432 (civil commitment); *Woodby* v. *INS*, 385 U.S. 276, 285, 286 (1966) (requiring "clear, unequivocal, and convincing" evidence in deportation cases); *Chaunt* v. *United States*, 364 U.S. 350, 354-55 (1960) (same, for denaturalization).

Where the Court has permitted civil detention, it has relied on the fact that the Government bore the burden of proof at least by clear and convincing evidence. *See, e.g.*, *Salerno*, 481 U.S. at 750, 752

("full-blown adversary hearing," requiring "clear and convincing evidence" and "neutral decisionmaker"); *Hendricks*, 521 U.S. at 352-53 (jury trial and proof beyond reasonable doubt). Conversely, this Court has struck down civil detention schemes that place the burden of proof on the detainee. *Foucha*, 504 U.S. at 81-83; *see also Zadvydas*, 533 U.S. at 692 (finding post-final-order custody review procedures deficient because, *inter alia*, they placed burden on detainee).

2. Application of the procedural due process balancing test from *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), further demonstrates that the Government must bear the burden by clear and convincing evidence. The prolonged incarceration suffered by Respondents deprives them of a "particularly important" interest. *Addington*, 441 U.S. at 424; *see also Zadvydas*, 533 US. at 689. To be sure, the Government has an interest in ensuring that noncitizens appear for proceedings and commit no crimes if released. But once detention becomes prolonged—and additional months or years of incarceration loom while removal proceedings continue—the detainee "should not be asked to share equally with society the risk of error [because] the possible injury to the individual is significantly greater than any possible harm to the state." *Addington*, 441 U.S. at 427.

The risk of erroneous deprivation at custody hearings reflects the tremendous power and information imbalance between the federal Government and an incarcerated noncitizen. The Government is represented by attorneys familiar with immigration court procedures, while the noncitizen is by definition detained (sometimes in a remote facility), often unrepresented, and frequently lacking English proficiency. J.A. 304-10; *cf. Santosky*,

455 U.S. at 762-63 (requiring clear and convincing evidence at parental termination proceedings because "numerous factors combine to magnify the risk of erroneous factfinding" including that "parents subject to termination proceedings are often poor, uneducated, or members of minority groups" and "[t]he State's attorney usually will be expert on the issues contested").

Further, detention is not the only alternative available to address concerns about danger and flight risk. The Government may use its ISAP Program, employing alternatives such as electronic monitoring, that has achieved extremely high success rates in ensuring appearance of released detainees. J.A. 380. The Government also may release—through ISAP or on other conditions—individuals with "major ties to the community" and "a question as to removability;" the Government's own witness testified that such individuals pose a "minimal flight risk." J.A. 566-67.

Finally, placing the burden on the Government imposes minimal inconvenience. DHS has electronic access to numerous enforcement databases and the noncitizen's "A file" (which it maintains, and which contains all immigration records), which it can use to make its case for continued detention. And the additional procedures that Respondents seek have saved the Government millions of dollars in detention costs since they were implemented as a result of this litigation. J.A. 529, fig.2; J.A. 88-89, tbl.18.

3. Petitioners counter that they need only show a "facially legitimate and bona fide" basis for detention under the plenary power doctrine. *See* Br. 54 (citing *Fiallo* v. *Bell*, 430 U.S. 787, 794-95 (1977)). But this Court does not employ such a deferential standard where prolonged detention is at stake. The cases Petitioners cite, Br. 54, did not consider the

constitutional problems posed by prolonged detention, much less the burden required to justify it. *Cf. Zadvydas*, 533 U.S. at 695 (plenary power "subject to important constitutional limitations").

4. Requiring the Government to bear the burden by clear and convincing evidence is not "unambiguously foreclose[d]," by Section 1226(c)(2), former INA 306(a)(4), Section 1225(b)(2)(A) or any other provision. Br. 52. None of the provisions Petitioners cite pertain to prolonged detention. Likewise, Petitioners suggest, Br. 51, that placing the burden on the Government is "fundamentally inconsistent" with the statutory scheme governing admission, but here too the provisions it cites—8 U.S.C. 1225(b)(2)(A) and 1229a(c)(2)—do not govern prolonged detention. *See supra* Point II.

The regulations Petitioners cite at 8 C.F.R. 1236.1, also do not address prolonged detention. If they did, they would raise serious constitutional problems, and therefore are not entitled to *Chevron* deference. *See Solid Waste Agency of N. Cook Cty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001); *Edward J. DeBartolo Corp.*, 485 U.S. at 574-75, 588. In any event, "the degree of proof required in a particular type of proceeding 'is the kind of question which has traditionally been left to the judiciary to resolve.'" *Santosky*, 455 U.S. at 755-56 (quoting *Woodby*, 385 U.S. at 284).[20]

Contrary to Petitioners' assertion, *Zadvydas* supports these safeguards. Br. 53. *Zadvydas* criticized, on due process grounds, "administrative proceedings where the alien bears the burden of

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[20] *Demore* counsel's statement in oral argument about burdens of proof, Br. 53, similarly did not address prolonged detention.

proving he is not dangerous, without (in the Government's view) significant later judicial review." 533 U.S. at 692. While it also discussed habeas proceedings, it recognized that what is required in habeas is distinct from the protections necessary in agency proceedings when the Government seeks to impose prolonged detention.

It strains credulity for Petitioners to argue that they suffer an "information asymmetry" as to Arriving Subclass members—often asylum seekers who are indigent and unrepresented—who have been incarcerated for six months. Br. 51. DHS has access not only to the "A file" and other law enforcement records, but also to State Department, Department of Defense, intelligence, and international (including INTERPOL) databases on a real-time basis, including through biometric fingerprinting.[21] DHS already verifies asylum-seekers' identity as part of the application process, 8 U.S.C. 1158(d)(5)(A)(i) (requiring identity check). An individual whose identity is unknown cannot win asylum and would therefore be a flight risk. *Matter of O-D-*, 21 I&N Dec. 1079, 1082 (BIA 1998).

In any event, these arguments do not apply to Class members who are not arriving noncitizens, and if the Court construes Section 1226(a) to require the Government to bear the burden of proof in prolonged detention custody hearings, that construction must apply equally to individuals seeking admission and

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[21] *See* DHS, *Privacy Impact Assessment for the TECS System: CBP Primary and Secondary Processing* 9-10 (Dec. 22, 2010), https://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_cbp_tecs.pdf; DHS, *Privacy Impact Assessment for the Automated Biometric Identification System (IDENT)* 3-5 (Dec. 7, 2012), https://www.dhs.gov/sites/default/files/publications/privacy-pia-nppd-ident-06252013.pdf.

others detained beyond six months. *See generally Clark*, 543 U.S. at 378-79, 383 (applying construction of detention statute necessary, per *Zadvydas*, to avoid constitutional problem as to admitted noncitizens "without differentiation to all . . . categories of aliens that are its subject" including "nonadmitted aliens").

Finally, the operation of prolonged detention custody hearings after the injunctions illustrates that, contrary to Petitioners' suggestion, the burden of proof here does not create "a presumptive entitlement to be released." Br. 15. Even where the Government has borne the burden of proof by clear and convincing evidence, it has defeated bond in 30% of cases and 30% of those ordered released on bond remained in detention because they could not afford the bond. *See* J.A. 529, fig.2.

B. Immigration Judges Must Consider Length Of Detention At Prolonged Detention Custody Hearings, And Must Conduct Them Periodically.

This Court's focus on detention length in both *Demore* and *Zadvydas* demonstrates why the length of past detention must be considered as a factor at custody hearings, and why hearings must occur every six months. A three-year detention constitutes a greater deprivation of liberty than one of six months, and accordingly demands greater justification. *Accord* Br. 47 (acknowledging that "as the passage of [detention] time increases a court may scrutinize the fit between the means and the ends more closely") (citing *Zadvydas*, 533 U.S. at 690).

For those who remain detained for months or years after an initial hearing, the additional deprivation requires greater justification, and therefore also requires periodic hearings to assess whether

detention remains reasonable in relation to its purpose. *See Mathews*, 424 U.S. at 335 (greater procedural protections required when the private interests at stake are weightier).

1. This Court has recognized the importance of periodic hearings, holding that "[a] confinement that is in fact indeterminate cannot rest on procedures designed to authorize a brief period of observation." *McNeil*, 407 U.S. at 249. In *Jackson* v. *Indiana*, the Court found lengthy pre-trial detention of incompetent criminal defendants unconstitutional where "[t]here is no statutory provision for periodic review of the defendant's condition." 406 U.S. at 720.

2. Applying the *Mathews* factors confirms the need to consider length of detention. It is undisputed that many Class members are incarcerated for far longer than six months, and that they face lengthy future periods of detention. More than half of Class members detained past six months were still detained at 12 months; 23% of them were still detained at 18 months; and 10% were still detained at 24 months. J.A. 74-75 & tbl.4; App. 18a-19a. Lead Plaintiff Alejandro Rodriguez was detained for more than three years and three months, and would have been detained more than seven years if not for this case, due to Petitioners' erroneous interpretation of the immigration laws. *See* J.A. 257-60.

The record establishes that Class members face a substantial risk of erroneous deprivation absent periodic hearings that consider detention length. Class members denied a hearing prior to the injunction received at most a paper review, such as the parole process described above. Those reviews were replete with procedural deficiencies, including lack of notice and failure to provide translation, and resulted in unjustified prolonged detention. J.A. 225-

69; App. 39a-40a. The risk of erroneous deprivation was amplified because, as the Ninth Circuit found, "[d]etainees, who typically have no choice but to proceed *pro se*, have limited access to legal resources, often lack English-language proficiency, and are sometimes illiterate." App. 48a; *see also* App. 143a (finding that the "bond hearing process would be fraught with peril if the Court were to place the burden on detainees to request a bond hearing").

For example, DHS initially denied release to an Arriving Subclass member, a Somali refugee, based on its assessment that he did not have a sponsor with whom he could live. Two months later, in his asylum application, he submitted a declaration from an American citizen family friend who pledged to house and assist him. But because there was no periodic review, he remained detained for an additional *year*. He obtained release only after prevailing on his asylum claim before the IJ. J.A. 227-29.

Finally, conducting periodic hearings imposes minimal costs. Petitioners stipulated below that "the cost of providing a bond hearing should [not] be considered in this case as a factor weighing in [their] favor." J.A. 588. Petitioners already conduct numerous bond hearings; they are typically brief (ten to fifteen minutes) and sometimes via video conference. *See* J.A. 573. And because detention costs dwarf supervision costs, Mot. for Summ. J. 20-21, ECF No. 281, hearings for Class members have saved millions of dollars. J.A. 529, fig.2; J.A. 88-89, tbl.18.

3. It is no surprise that the immigration statute and regulations are silent as to periodic hearings and consideration of detention length, Br. 54-55, because these requirements apply only once detention becomes prolonged. *Compare* 8 C.F.R. 241.14(k)(1)-(3) (providing for IJ review every six months for specially

dangerous post-order detainees whose removal is not significantly likely). For the same reason, Petitioners' reliance on *Chevron* deference and the plenary power doctrine, Br. 54-55, is misplaced. Neither doctrine governs when, as here, detention is prolonged and raises serious constitutional problems.

Nor are *Mathews'* requirements satisfied by a Class member's right, under 8 C.F.R. 1003.19(e), to request additional custody hearings based on "changed circumstances." Br. 54-55. Because the agency does not count additional time in detention as a "changed circumstance," a detainee cannot obtain a new custody hearing based on the passage of time. J.A. 317. On Petitioners' view, a Class member who received a custody hearing at six months could be subjected to years of additional detention with no ability to secure another hearing. *See* App. 47a (citing example of asylum seeker detained for nearly four years). The record establishes that requiring detainees to affirmatively request hearings does not ensure meaningful access to detention review. J.A. 523-24.

Petitioners mistakenly analogize to the Bail Reform Act, Br. 55, but pretrial detention in criminal cases is generally subject to the "stringent time limitations of the Speedy Trial Act." *Salerno*, 481 U.S. at 747; *see* 18 U.S.C. 3161(c)(1) (requiring criminal trial to begin within seventy days of indictment). Indeed, even though the Act does not mention length of detention, when courts have considered *prolonged* pretrial detention, they have required consideration of additional factors "such as the length of the detention." *United States* v. *Hare*, 873 F.2d 796, 801 (5th Cir. 1989); *see also United States* v. *Ojeda Rios*, 846 F.2d 167, 169 (2d Cir. 1988) (per curiam).

CONCLUSION

For these reasons, this Court should affirm the decision below.

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In the Supreme Court of the United States

DAVID JENNINGS, ET AL., PETITIONERS

v.

ALEJANDRO RODRIGUEZ, ET AL.,
INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondents brought this sweeping class action asking whether aliens detained during removal proceedings must be given bond hearings before an immigration judge (IJ), and thus be potentially released, after six months. The court of appeals answered that question in the affirmative as a matter of statutory interpretation. The controlling text, however, clearly establishes that the court of appeals was wrong. Indeed, 8 U.S.C. 1226(c) provides that the Secretary of Homeland Security "shall take into custody" a covered criminal alien during removal proceedings, and "may release" him "*only if*" a narrow and inapplicable exception is satisfied. *Ibid.* (emphasis added). That plainly precludes any additional, unwritten exceptions. And for a century, 8 U.S.C. 1225(b) and its predecessors have provided that an alien seeking admission "shall be detained" pending removal proceedings if he

is "not clearly and beyond a doubt" entitled to be admitted. *Ibid.* Such aliens have been released in the interim, if at all, solely via the Executive's discretionary parole authority. Bond hearings before an IJ have never been available.

Respondents have little to say about the controlling statutory text. In defending the six-month cap, respondents instead primarily contend that Sections 1225(b) and 1226(c) can be unconstitutional in some applications. But they do not contend that the Due Process Clause would itself require a rigid six-month cap. And the canon of constitutional avoidance does not apply when the statutory text is clear or when the supposed saving construction would subvert Congress's intent. Here, the detention of criminal aliens and aliens seeking admission is a vital, intended, and clear feature of U.S. immigration law, not a problem Congress wanted to avoid.

Moreover, even the court of appeals recognized that Section 1225(b) is plainly constitutional in "likely the vast majority" of its applications. Pet. App. 86a. To the extent doubts could conceivably arise in an extraordinary case involving a lawful permanent resident (LPR) returning from abroad, those doubts would appropriately be resolved in an as-applied challenge to the provision that authorizes treatment of an LPR as an applicant for admission in narrow circumstances, 8 U.S.C. 1101(a)(13)(C), not a sweeping challenge to Section 1225(b).

Similarly, under *Demore* v. *Kim*, 538 U.S. 510 (2003), Section 1226(c) is constitutional in the vast majority of its applications. Given Section 1226(c)'s unambiguous mandate, challenges to its constitutionality in outlier cases must be assessed in a case-by-

case inquiry that takes into account the unusual circumstances that made the case an outlier in the first place. There is no basis for imposing rigid rules that would blind courts to the case-specific reasons why removal proceedings are ongoing.

I. THE STATUTORY TEXT FORECLOSES THE COURT OF APPEALS' SIX-MONTH RULE

A. Section 1226(c) Forecloses A Six-Month Rule

Section 1226(c) is crystal clear. It mandates that the Secretary "shall" take specified criminal aliens into custody, and "may release" them during removal proceedings "only if" the witness-protection exception is satisfied. 8 U.S.C. 1226(c). Respondents have no response. Indeed, the phrase "only if" does not appear in their brief.

Respondents nonetheless seek to defend the court of appeals' six-month cap by asserting (Br. 34) that Section 1226(c) "does not say for how long" detention lasts. That is incorrect. Section 1226 expressly governs detention "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. 1226(a). The statute provides that, during that period, the Secretary may either detain an alien or release him on bond—"*[e]xcept as provided in subsection (c).*" *Ibid.* (emphasis added). Section 1226(c)'s mandate therefore applies throughout removal proceedings.

Contrary to respondents' assertion (Br. 35), reading "only" to mean "only" does not render "superfluous" the USA PATRIOT Act (Patriot Act), Pub. L. No. 107-56, § 412(a), 115 Stat. 350-351. Section 1226(c) and the Patriot Act both mandate detention of terrorists, but the Patriot Act is broader in several key respects.

First, it mandates detention of an alien whom the Secretary certifies is engaged in "activity that endangers the national security of the United States." 8 U.S.C. 1226a(a)(3)(B). Section 1226(c) does not. Under the Patriot Act, the Secretary must renew his certification every six months, 8 U.S.C. 1226a(a)(7), but there is nothing comparable to a "*Joseph* hearing" for a criminal alien to challenge the basis for his mandatory custody, *Demore*, 538 U.S. at 514 n.3. And whereas detention under Section 1226(c) ends upon a decision "*whether* the alien is to be removed," 8 U.S.C. 1226(a) (emphasis added), detention under the Patriot Act lasts "until the alien *is removed*," 8 U.S.C. 1226a(a)(2) (emphasis added). Congress has thus sensibly provided multiple, partially overlapping authorities for responding to terrorism, but they are different, not superfluous.

B. Section 1225(b) Forecloses A Six-Month Rule

1. Respondents make virtually no effort to defend the Ninth Circuit's interpretation of Section 1225(b) as mandating bond hearings for all covered aliens at six months. They devote less than a page (Br. 47-48) to that question, simply asserting that 8 U.S.C. 1225(b)(2)(A) "should be read" as capped at six months "for LPRs" returning from abroad—apparently to avoid supposed constitutional doubts—and that "[i]t follows" that 8 U.S.C.1225(b)(1)(B)(ii) should be construed the same way for asylum seekers with a credible fear of persecution.[1]

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[1] The injunction here requires bond hearings for *all* aliens detained for six months during removal proceedings under Section 1225(b), not merely LPRs and asylum seekers. Pet. App. 140a-144a.

As our opening brief explains (Br. 24-29), the possibility that a returning LPR might be subject to detention under Section 1225(b) raises no significant constitutional problem, and in any event would not justify a six-month cap on detention of all aliens under Section 1225(b) without a bond hearing. If any constitutional question were to arise in an extraordinary case involving an LPR, it should be resolved in an as-applied challenge to Section 1101(a)(13)(C)—the provision allowing returning LPRs to be treated as seeking admission in narrow circumstances—not a broad attack on Section 1225(b).

Moreover, respondents never explain how Section 1225(b)(2)(A) can be fairly construed to mandate bond hearings at the six-month mark, for LPRs or anyone else. And it would not "follow[]" that Section 1225(b)(1)(B)(ii) should be interpreted the same way. That provision *never* applies to LPRs, and thus is constitutional in all of its applications under this Court's longstanding jurisprudence. This Court accordingly should reverse the judgment in favor of the Section 1225(b) subclass, which was based on those erroneous interpretations.

2. Respondents now primarily press a novel argument. They tacitly accept (Br. 42-44) that Section 1225(b) mandates detention, but contend that it applies only *before* removal proceedings begin, and that Section 1226(a) takes over at that point. In doing so, they seek to distinguish mandatory detention "for" removal proceedings in 8 U.S.C. 1225(b)(1)(B)(ii) and (2)(A), from detention "pending" a decision on removal, in 8 U.S.C. 1226(a). Mandatory detention "for" removal proceedings, they now insist (Br. 42), does not apply once removal proceedings begin.

Respondents forfeited this argument below. They obtained an injunction requiring bond hearings for aliens "detained under 8 U.S.C. § 1225(b)" for six months "pending completion of removal proceedings," Pet. App. 139a-140a, based on the subclass they defined on the same basis, *id.* at 108a, and their evidence about its members, *e.g.*, J.A. 97. Respondents cannot now argue that no such aliens exist and that the subclass is a null set.

Respondents claim (Br. 44 n.17) that they "had no occasion" to make this argument below because circuit precedent established that Section 1225(b) does not authorize "prolonged" detention during removal proceedings. But their new position is inconsistent with that precedent, because it would mean that Section 1225(b) does not authorize detention during removal proceedings at all—*not even for a single day*. No court has ever accepted that radical position, which would dramatically weaken the Secretary's ability to protect our Nation's borders.

3. Respondents' elaborate gloss on the word "for" is also wrong. Since 1917, Congress has mandated that aliens who are not clearly entitled to be admitted (or enter) "shall be detained *for*" proceedings to determine whether the alien should be removed. 8 U.S.C. 1225(b)(2)(A) (emphasis added); Immigration and Nationality Act, ch. 477, Tit. II, § 235(b), 66 Stat. 199 (same); Immigration Act of 1917, ch. 29, § 16, 39 Stat. 886 (same). Congress has repeatedly amended that provision without departing from the longstanding practice that parole is the exclusive means for releasing such aliens during removal proceedings.

Even if Section 1226(a) nonetheless somehow applied here, respondents' argument would still fail.

Section 1226(a) "does not grant bail as a matter of right." *Carlson* v. *Landon*, 342 U.S. 524, 540 (1952). Rather, that decision is left to the Attorney General's discretion. See 8 U.S.C. 1226(a) ("may"). Controlling regulations in turn provide that IJs "may not" conduct bond hearings for "[a]rriving aliens." 8 C.F.R. 1003.19(h)(2)(i)(B).[2] That regulation codifies the rule that has protected our Nation's borders for a century, and forecloses respondents' position.

II. RESPONDENTS' CONSTITUTIONAL ARGUMENTS REGARDING SECTION 1225(b) LACK MERIT

As explained above, Section 1225(b) cannot be read to impose a six-month cap. Nor would principles of constitutional avoidance support such an effort even if the text permitted it.

A. In urging the Court to impose a six-month cap out of supposed constitutional concerns, respondents ask this Court (Br. 27-31) to jettison the legal regime that has governed the border since 1917, and disregard *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953). But this case provides no occasion for revolutionizing immigration law.

Even if the Court were someday to curtail the force of the entry doctrine, that would provide no basis for affirming. The Due Process Clause itself still could not be read to support a rigid six-month cap on detention under Section 1225(b) for every alien, regardless of individual circumstances. In addition, all nine Justices in *Mezei* agreed that the returning LPR could be indefinitely detained to effectuate his exclusion, if he

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[2] This prohibition does not apply to the aliens in *In re X-K-*, 23 I. & N. Dec. 731 (B.I.A. 2005), who already entered the United States and thus were not "arriving aliens." *Id.* at 732.

was given notice of and opportunity to dispute the basis for his exclusion. *E.g.*, 345 U.S. at 222-223 (Jackson, J., dissenting). Every alien detained under Section 1225(b)(1)(B)(ii) or (2)(A) has those protections and more: They are in proceedings before an IJ; they can appeal; and the Secretary may release them on parole. Time spent in detention during removal proceedings in turn is ordinarily a signal that the alien is taking advantage of the process available to them, not that process is lacking.

Moreover, unlike in *Mezei*, detention here has a "definite termination point," *Demore*, 538 U.S. at 529; "likely the vast majority" of aliens detained under Section 1225(b) are *not* LPRs, Pet. App 86a; and many aliens here can voluntarily end detention simply by returning home. In *Mezei*, by contrast, the alien's home countries had refused to "take him back." 345 U.S. 207. Respondents' discussion of *Mezei* therefore furnishes no basis for sustaining a six-month rule.

B. In any event, respondents' radical argument lacks merit. This Court "has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982). And the Court in *Mezei* did more than "mention[]" detention. Resps. Br. 28. It affirmed the alien's exclusion and detention, which were flip sides of the same coin. See *Zadvydas* v. *Davis*, 533 U.S. 678, 694 (2001) (describing *Mezei* as rejecting "both" the alien's "challenge to the procedures by which he was deemed excludable" and "his challenge to continued detention").

Respondents contend (Br. 29-30) that *Mezei* is anachronistic. But "[t]he distinction between an alien who has effected an entry into the United States and one who has never entered" is not unique to *Mezei*: it "runs throughout immigration law," *Zadvydas*, 533 U.S. at 693, and is central to maintaining the security and integrity of the Nation's borders. The *stare decisis* force of this deep-rooted and oft-repeated distinction is extraordinary. See *Kleindienst* v. *Mandel*, 408 U.S. 753, 765-767 (1972).

Respondents' reliance (Br. 27) on *Addington* v. *Texas*, 441 U.S. 418 (1979), is likewise misplaced. Aliens on the threshold of initial entry are in a fundamentally different position than U.S. residents. *Before* the U.S. resident in *Addington* was taken into custody, he was living here and indisputably had a substantive right to be at liberty inside the United States that could not be denied without due process of law. By contrast, aliens on the threshold of initial entry lack prior contacts with the United States and have failed to show that they are "clearly and beyond a doubt entitled" to be at liberty inside the United States at all. 8 U.S.C. 1225(b)(2)(A). It thus puts the cart before the horse—and conflicts with fundamental principles of sovereignty and constitutional authority, *e.g.*, *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542-544 (1950)—to argue that the Due Process Clause requires that aliens arriving at our borders must be given individualized IJ hearings to provide for their possible release into the United States during their removal proceedings. The point of removal proceedings is to decide *whether the alien should be allowed to be at liberty inside the United States in the first place.*

This Court has "long recognized [that] the power to expel or exclude aliens [i]s a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (citation omitted); see *Arizona* v. *United States*, 132 S. Ct. 2492, 2498 (2012). By contrast, a State's authority to deprive a resident of personal liberty has long been subject to close judicial supervision. See *Addington*, 441 U.S. at 425. *Addington* also involved confinement "for an indefinite period." *Id.* at 420. Detention here does not. See *Demore*, 538 U.S. at 528-529. And unlike individuals subject to *involuntary* civil commitment, aliens arrive at our borders through voluntary private conduct, and they can voluntarily end detention by returning home.

C. To be sure, some aliens fear persecution if returned home. But a detailed scheme exists for determining whether an asylum claim is *bona fide*, while preventing abuse of the system. Gov't Br. 2-4. Among other protections, aliens initially in expedited removal proceedings who establish a credible fear are referred for proceedings before an IJ. 8 C.F.R. 208.30(f). The policy of U.S. Immigration and Customs Enforcement (ICE) is to consider every such alien for release on parole and ordinarily to release them, unless ICE concludes that the alien has not adequately established his identity or is a security or flight risk. J.A. 48-49, 53-54.

Respondents allege that several asylum seekers were nonetheless improperly denied parole, and they claim (Br. 30-32) that parole is "not an adequate substitute for an IJ hearing." But the lower courts made no factual findings regarding respondents' allegations,

which were contested.[3] *E.g.*, D. Ct. Doc. 299-3, at 13-14 (Mar. 15, 2013); D. Ct. Doc. 303, at 22-27 (Mar. 15, 2013). And this class action would provide no basis for considering claims by particular asylum seekers (or LPRs returning from "brief travel abroad," Resps. Br. 31-32), because any such claim would depend on individualized considerations that could not support a rigid six-month cap. Nor is it (*id.* at 28 n.10) "arbitrary" to detain aliens arriving at our borders during removal proceedings when necessary to avoid a risk of flight or danger to the community. And such detention comports with the United States' obligations under international law. See Gov't C.A. Reply Br. 34 n.12.

III. RESPONDENTS' CONSTITUTIONAL ARGUMENTS REGARDING SECTION 1226(c) LACK MERIT

Section 1226(c)'s text likewise forecloses the six-month cap on mandatory detention the Ninth Circuit imposed as a matter of statutory interpretation, see pp. 3-4, *supra*, and principles of constitutional avoidance would not support such a rule.

In arguing otherwise, respondents contend (Br. 19) that *Demore* carved out only a "narrow exception" to what they assert is a general rule that individualized bond hearings are required as a precondition to confinement. But respondents rely (Br. 17-19) on domestic civil-commitment and criminal-law precedents. *Demore*, by contrast, relied on the distinct principles and precedent concerning Congress's broad power over

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[3] For example, respondents assert (Br. 7) that one alien was mistakenly denied parole because of concerns about apparently correlated claims by Somali detainees, when he "was *not* Somali." That alien used a fake passport, had no valid documentation, and claimed his Somali-origin clan faced persecution. D. Ct. Doc. 281, Arulanantham Decl., Ex. 73, at 1-4; Ex. 74, at 1-2 (Feb. 8, 2013).

immigration, without characterizing its holding as a narrow exception. See 538 U.S. at 521-531. In any event, *Demore* leaves no room for the rigid six-month rule respondents defend.

A. Respondents Cannot Distinguish *Demore*

1. Respondents contend (Br. 12) that "the deprivation of liberty at issue here is greater than in *Demore*," as subclass members are "often" detained for longer than in *Demore*. But they are also "often" detained for comparable or shorter times. The alien in *Demore* (Hyung Joon Kim) was detained for 197 days before obtaining habeas relief, and this Court's judgment meant that he would be returned to custody until his removal proceedings finished. Gov't Br. 35-36 & n.11. That would certainly take time: Kim had not yet had his removal hearing, and he could later appeal. *Demore*, 538 U.S. at 530-531; see Am. Immigration Council et al. Amicus Br. 8 n.4 (asserting that Kim was detained ten more months). Many class members were released in shorter or similar periods. See J.A. 188 (44.3% of in-period class members released by 9 months, 67% by 12 months, and 84% by 16 months).[4] Moreover, Kim was an LPR who had lived in the United States virtually his entire life. *Demore*, 538 U.S. at 513. Many subclass members are not.

More fundamentally, any due process challenge to Section 1226(c) must be assessed in the context of the administrative adjudicatory system as a whole, under which the proceedings of the great majority of covered aliens are completed in a short period of time.

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[4] The government's expert focused on "in-period" aliens to correct for a selection bias in the sampled data. J.A. 140-143. Figures are similar even without this correction. J.A. 188.

See pp. 17-19, *infra*. That assessment must also take into account the many procedural protections afforded to aliens for contesting removability or seeking relief from removal. Aliens' invocation of those opportunities can lengthen proceedings and, hence, detention. The subclass of aliens here, consisting of aliens detained under Section 1226(c) for more than six months, reflects that unremarkable aspect of the overall adjudicatory system.

Self-selection of cases that take longer to resolve thus cannot itself make detention under Section 1226(c) unconstitutional. Section 1226(c) is constitutional so long as detention serves its "purported immigration purpose" of preventing fight and recidivism. *Demore*, 538 U.S. at 527; see *id.* at 532-533 (Kennedy, J., concurring). It thus matters *why* a particular detained alien's proceedings have not been completed, including whether the alien sought continuances, contested the charges of removability, sought relief from removal notwithstanding that he is removable, filed an appeal, or engaged in dilatory tactics. A rigid cap, however, precludes consideration of the reasons why an outlier case is an outlier in the first place.

Respondents contend (Br. 23-24) that aliens often have good reasons to seek continuances. But this Court upheld Kim's detention during a continuance he sought "to obtain documents" to support his request for relief from removal. *Demore*, 538 U.S. at 531 n.15. And the reasons for seeking continuances, their number, and their length, are highly individualized.

Respondents contend (Br. 25) that class members "do not control how long the [Board of Immigration Appeals (BIA)] and circuit courts take to resolve appeals." But IJs and the BIA prioritize cases involving

detained aliens. Gov't Br. 49. And in the end, an alien must make the "difficult judgment[]" whether to appeal an adverse decision notwithstanding that detention is mandatory during the appeal. *Demore*, 538 U.S. at 530 n.14 (citation omitted). Aliens who choose to petition for judicial review and to seek a stay of removal also can request the court to expedite their cases. For example, respondents highlight (Br. 55) that Alejandro Rodriguez spent "three years and three months" in detention. But three quarters of that time was under a stay of removal he requested. See Br. in Opp. 9 ("approximately nine months" in agency proceedings).

2. Respondents assert (Br. 12, 19) that *Demore* was based on Kim's concession that he was deportable, whereas, they say, many aliens here do not make that concession. But contrary to respondents' assertion (Br. 20 n.5), an alien is "deportable" if the charges against him are valid. *E.g.*, 8 U.S.C. 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony * * * is deportable."). Relief from removal thus might prevent an alien from "*ultimately be[ing] deported*," but not from being "*deportable*." *Demore*, 538 U.S. at 523 n.6. This Court's analysis also does not indicate why Kim's concession that he was deportable would make a difference; instead, the Court noted that aliens could request a "*Joseph* hearing" to challenge the basis for mandating detention. *Id.* at 514 n.3. Moreover, the subclass likely includes many aliens who concede they are deportable. Indeed, challenges to deportability appear to be uncommon and rarely succeed. See J.A. 96 (only 20 of 460 subclass cases were "terminated").

Respondents contend (Br. 13) that "a large majority of Class members present substantial defenses to removal" and "have powerful incentives to appear" that "were largely absent in *Demore*." But that is no distinction: Kim himself applied for withholding of removal; his counsel characterized that as presenting a "substantial question not for purposes of delay," *Demore* Oral Arg. Tr. 42, and his counsel argued that LPRs have "an obvious incentive to appear for removal hearings" because they have "the strongest claims to relief from removal," *Demore* Resp. Br. 32.

Respondents' assertion (Br. 20 n.5) that 97% of subclass members who sought relief have a "substantial defense" is also exaggerated. They define (*ibid.*) "substantial" to mean *any* challenge to the charged ground of removability, and *any* claim for relief from removal (except withholding of removal). A frivolous request for cancellation of removal thus counts as "substantial." That cannot be the measure of constitutionality. Indeed, respondents have not disputed our submission that "criminal aliens detained under Section 1226(c) are almost always found removable and usually ordered removed"—even among subclass members. Gov't Br. 45.

3. Respondents contend (Br. 39) that "many individuals released through [*Rodriguez*] hearings pose no danger." But *Demore* cannot be distinguished on the basis of *ex post* anecdotes. Congress enacted Section 1226(c) because IJs could not predict *ex ante* which released criminal aliens would reoffend or flee, and experience showed that they did so "in large numbers." *Demore*, 538 U.S. at 513. Congress responded with a categorical judgment that no such aliens should

be released on bond, and this Court upheld that judgment in *Demore*. *Ibid.*

Respondents cannot show that IJs today are materially better at predicting the future than they were at the time of *Demore*. Respondents tout (Br. 40) "alternatives to detention." But "monitoring mechanisms which can be employed as viable alternatives to detention" existed at the time of *Demore*. 538 U.S. at 555 n.10 (Souter, J., concurring in part and dissenting in part) (citation omitted). Although some programs are effective in reducing flight, that is true only for the "low risk individuals" placed into those programs in the first place. J.A. 364. Aliens who pose a danger are not included. See *ibid.*; see also *In re Urena*, 25 I. & N. Dec. 140, 141 (B.I.A. 2009).

This Court also may consider other support for the proposition that "flight and recidivism remain serious concerns." Gov't Br. 33 (citing Exec. Office for Immigration Review, *FY 2015 Statistics Yearbook* P3 (Apr. 2016) (*2015 Yearbook*)); cf. *Arizona*, 132 S. Ct. at 2500 (relying on official yearbook data); *Demore*, 538 U.S. at 520 (non-record study of failure to appear); *Demore* Resp. Br. 8, 39 (same). Indeed, respondents cite (Br. 41 & n.15) a new non-record study by their expert witness reporting flight by 14% of the aliens the expert found relevant. That study confirms that flight remains a serious concern, as this Court found it "striking" that 20% of released aliens failed to appear. *Demore*, 538 U.S. at 520. The 14% figure is also understated, because it includes "other completions," which encompasses aliens whose cases were "administratively closed" and thus had nothing to flee. See *2015 Yearbook* C5.

B. This Court Should Not Overrule *Demore*

Respondents assert in passing (Br. 22-23) that the Court should overrule *Demore*. Principles of *stare decisis* "weigh heavily" against doing so. *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000). "[E]ven in constitutional cases, the doctrine carries such persuasive force that [the Court has] always required a departure from precedent to be supported by some 'special justification.'" *Ibid.* (citation omitted). Respondents offer only one (Br. 22): that *Demore* "rests on erroneous facts." The government regrets that it provided inaccurate information to the Court, but the relevant data do not undermine the Court's core holding concerning the constitutionality of mandatory detention.

The Court discussed statistics after distinguishing *Zadvydas* on the grounds that detention under Section 1226(c) "serve[s] its purported immigration purpose" and is not "indefinite" or "potentially permanent," but instead is "of a much shorter duration." *Demore*, 538 U.S. at 527-528 (citation omitted). Both distinctions are valid. Indeed, the Court in *Zadvydas* itself distinguished Section 1226(c) on this basis, and did so without statistical support. See 533 U.S. at 697.

This Court in *Demore* then went on to say that, "[u]nder § 1226(c), not only does detention have a definite termination point, in the majority of cases it lasts for less than the 90 days we considered presumptively valid in *Zadvydas*." 538 U.S. at 529. The Court's phrasing suggests that this was an additional point, apparently intended to illustrate the practical impact of its ruling on other cases.

Moreover, the corrected figures from the Executive Office for Immigration Review (EOIR) still show that, "in the majority of cases" detention lasted less than 90 days. *Demore*, 538 U.S. at 529. Indeed, they show that the vast majority of cases ended *faster* than the Court stated. Gov't *Demore* Letter 2 (median of 15 days, not 30 days, for non-appealed cases). EOIR's corrected calculations also show that BIA appeals were relatively infrequent and took roughly the same time the Court stated. An average and median of 141 and 119 days to complete an appeal, *ibid.*, is materially identical to "an average of four months, with a median time that is slightly shorter," *Demore*, 538 U.S. at 529. Aliens deciding whether to appeal thus must make the same "difficult judgment[]" this Court discussed. *Id.* at 530 n.14 (citation omitted).

The Court did significantly understate the typical time, in appealed cases, to complete *both* the IJ and BIA stages, because cases that are later appealed typically take longer for IJs to decide in the first place. The Court stated that such cases typically take "about five months" total. *Demore*, 538 U.S. at 530. EOIR has calculated that the corrected figure is about nine months (median 272 days). Gov't *Demore* Letter 2-3.[5] But the Court's analysis turned on the reasons why detention is occurring, not merely its length. See *Demore*, 538 U.S. at 527-531.

The Court's discussion of medians and averages also cannot be read to establish outer boundaries for detention. By definition, half of cases last as long as

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[5] The average EOIR calculated (382 days, see Gov't *Demore* Letter 3) is considerably longer, indicating "a short fat tail to the left and a long skinny tail to the right," with some cases taking an unusually long time. J.A. 168.

or longer than the median—and Kim's case was one of them, notwithstanding that he had not appealed. Yet the Court squarely upheld Kim's detention. *Demore*, 538 U.S. at 531. There is accordingly no basis for overruling that decision.

C. Any Claim That Detention Under Section 1226(c) Has Become Unconstitutional Must Be Resolved In An Individual As-Applied Challenge

1. Under *Demore*, Section 1226(c) is constitutional in the overwhelming majority of cases—with exceptional cases turning on why removal proceedings (and detention incident thereto) are ongoing. See Gov't Br. 46-50. Moreover, Section 1226(c) plainly forecloses any prophylactic rule as a statutory matter: It permits release "only if" the witness-protection exception is satisfied. 8 U.S.C. 1226(c)(2).

Even if it were permitted, the six-month rule is greatly overbroad and unduly rigid. The government does not claim it would be "rare" (Resps. Br. 26) for criminals to be released after *Rodriguez* hearings. The problem is that release would be *all too common*. In the vast majority of cases, detention under Section 1226(c) will end faster than in *Demore*—particularly when considering the time Kim would need to spend in detention on remand. See p. 12, *supra*. And "criminal aliens detained under Section 1226(c) are almost always found removable and usually ordered removed." Gov't Br. 45. Yet a six-month rule would give most such aliens—criminal aliens who are constitutionally detained and will be ordered removed—a presumptive entitlement to be released on bond so long as detention lasts six months. See Resps. Br. 26 ("roughly 70%" of class members are granted bond). That would severely undermine Congress's purpose of preventing

criminal aliens from fleeing or reoffending during removal proceedings, and would create a powerful incentive for them to prolong their proceedings.

Respondents' one-size-fits-all approach is also incompatible with the flexible adjudicatory system Congress established for deciding removal cases. Among other available protections, aliens may (1) challenge their mandatory detention in a "*Joseph* hearing"; (2) concede they are deportable or inadmissible as charged but seek relief from removal; (3) seek continuances; (4) appeal to the BIA; and (5) file a petition for review in federal court and seek a stay of removal. Gov't Br. 46-50; *Demore*, 538 U.S. at 514 n.3. A deadline that treats every removal case as essentially interchangeable thus ignores that some will be very different from others, for good reason, due to the alien's choices and other individual circumstances. Challenges to exceptional applications of Section 1226(c) therefore must be decided on an individual basis that takes into account the exceptional circumstances of the case—not a rigid rule that makes them irrelevant.

2. This Court could offer some guidance, however, by making clear that detention under Section 1226(c) "is entitled to a strong presumption of constitutionality for its duration." Gov't. Br. 48. A criminal alien whose proceedings (and detention incident thereto) continue markedly beyond the range of time for resolving most similar cases could overcome that presumption, however, by showing that detention no longer furthers its immigration purposes and instead is for some other purpose (or no purpose at all). *Ibid.*

The record here also suggests time frames that, at least on a stage-by-stage basis, were markedly unusu-

al for class members. The IJ stage was almost always completed within 14 months. J.A. 191 (90% of in-period cases without an appeal ended by 435 days). And it was markedly unusual for a case with a BIA appeal to last 20 months total. *Ibid.* (90% of in-period cases appealed solely to the BIA appeal ended by a total of 563 days). Longer durations could fairly prompt a closer look into the reasons why the proceedings remain ongoing.[6]

IV. RESPONDENTS' ARGUMENTS ABOUT BOND PROCEDURES LACK MERIT

A. Respondents do not even try to square their arguments for wholesale revision of the procedures for bond hearings with the text of any relevant statute or regulation. They instead assert across-the-board (Br. 52) that "[n]one of the provisions Petitioners cite pertain to prolonged detention." But laws and regulations do not need to say "prolonged" to apply until removal proceedings end. Section 1226 governs detention "pending a decision on whether the alien is to be removed from the United States," 8 U.S.C. 1226(a), and every relevant procedural provision here governs detention until that decision is made.

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[6] Some circuits have held that Section 1226(c) applies during a stay of removal entered by a court of appeals, rather than 8 U.S.C. 1231. See Gov't Br. 8 n.4. Section 1231 generally permits release after 90 days; Section 1226(c) does not. An alien's "difficult judgment[]" whether to seek a stay of removal, *Demore*, 538 U.S. at 530 n.14, accordingly must be made by assessing the applicable law, the expected duration of review, and the prospects of success. This Court also may wish to urge courts to expedite consideration of cases involving detained aliens. Cf. *Chafin* v. *Chafin*, 133 S. Ct. 1017, 1027-1028 (2013).

For example, until removal proceedings end, a criminal alien cannot be released even under the witness-protection exception unless *the alien* shows that he "will *not* pose a danger" or be a flight risk. 8 U.S.C. 1226(c)(2) (emphasis added). The regulations implementing bond authority under Section 1226(a)—including by placing the burden of proof on the alien—similarly govern all "[a]pprehension, custody, and detention" of aliens "[p]rior to [an] [o]rder of [r]emoval." 8 C.F.R. Pt. 236, Subpt. A; 8 C.F.R. Pt. 1236, Subpt. A. And the rule that IJs will provide subsequent bond hearings only when circumstances have materially changed is part of the immigration court rules of procedure, which apply in all proceedings "before Immigration Judges." 8 C.F.R. 1003.12.

Respondents contend that "[a] confinement that is in fact indeterminate cannot rest on procedures designed to authorize a brief period of observation." Br. 55 (quoting *McNeil* v. *Director*, 407 U.S. 245, 249 (1972)). But the confinement here is not "indeterminate." It has an "obvious termination point": the end of removal proceedings. *Zadvydas*, 533 U.S. at 697. The statutes and regulations here thus must be applied as written.

B. To the extent respondents contend that those procedures are unconstitutional as to every alien detained for six months, they are wrong. Their premise is (Br. 49) that "prolonged immigration detention constitutes such a significant deprivation of liberty as to require a custody hearing." But as set forth above, even respondents do not contend that the Due Process Clause itself requires bond hearings at the six-month mark, for every alien detained here, regardless of individual circumstances. There is accordingly no con-

stitutional basis for rewriting bond procedures across the board.

Even if bond hearings were requried, there would be "no problem" putting the burden on a criminal alien covered by Section 1226(c), when detention lasted longer than six months—as in *Demore*. *Demore* Oral Arg. Tr. 48. A convicted criminal seeking bail pending appeal similarly must show that he is *not* a danger or flight risk, see *Demore*, 538 U.S. at 578 (Breyer, J., concurring in part and dissenting in part) (analogizing to bail pending appeal), and appeals often take more than six months. And it would be plainly appropriate for the alien to bear the burden in the Section 1225(b) context, where Congress has long made that judgment. See 8 U.S.C. 1225(b)(2)(A) (mandating detention when alien is "not clearly and beyond a doubt entitled to be admitted").[7]

There would also be no constitutional problem with 8 C.F.R. 1003.19(e), which authorizes additional bond hearings only when circumstances have changed materially. And the length of detention need not be counted twice, both when deciding whether to grant a hearing—and again in the hearing when deciding whether to grant bond. Respondents cite (Br. 57) several pretrial detention cases, but each considered duration only once.

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[7] Aliens detained under Section 1226(a) also validly bear the burden. See 62 Fed. Reg. 10,323 (Mar. 6, 1997); Gov't Br. 52-53.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General

NOVEMBER 2016

RECORD AND BRIEFS

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In the Supreme Court of the United States

DAVID JENNINGS, ET AL., PETITIONERS

v.

ALEJANDRO RODRIGUEZ, ET AL.,
INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Constitution requires that aliens seeking admission to the United States who are subject to mandatory detention under 8 U.S.C. 1225(b) must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months.

2. Whether the Constitution requires that criminal or terrorist aliens who are subject to mandatory detention under 8 U.S.C. 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months.

3. Whether the Constitution requires that, in bond hearings for aliens detained for six months under 8 U.S.C. 1225(b), 1226(c), or 1226(a), the alien is entitled to release unless the government demonstrates by clear-and-convincing evidence that the alien is a flight risk or a danger to the community, whether the length of the alien's detention must be weighed in favor of release, and whether new bond hearings must be afforded automatically every six months.

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SUPPLEMENTAL BRIEF FOR THE PETITIONERS

The United States respectfully submits this supplemental brief in response to the Court's order of December 15, 2016. As set forth below, the Constitution does not require the government to conduct a bond hearing for an alien whenever removal proceedings and detention incident to those proceedings under 8 U.S.C. 1225(b), 1226(c), or 1226(a) last six months. Moreover, in any bond hearing, the Constitution does not require the government to bear the burden of proving that the alien is a flight risk or danger, much less by clear-and-convincing evidence. The Constitution also does not require that the length of past detention be considered as a factor in any bond hearing.

SUMMARY OF ARGUMENT

This Court asked whether the Constitution requires the government to provide a bond hearing, or certain

additional protections, when removal proceedings and detention incident to those proceedings under 8 U.S.C. 1225(b), 1226(c), or 1226(a) last six months. No court has ever held that the Constitution imposes such an inflexible mandate on any one of those provisions, much less all three. And this broad class action does not provide a suitable vehicle for deciding highly individualized questions of when, under the unusual circumstances of a particular case, detention pending removal proceedings could potentially become unconstitutional. Rather, any such questions are appropriately resolved in an as-applied challenge in an individual habeas case that can take into account the reasons that make that case exceptional in the first place.

I. Before determining whether the Due Process Clause requires *more* process, it is critical to understand the baseline that is already provided. Here, many procedural and substantive safeguards exist to prevent arbitrary deprivations of liberty. First, detention pending removal proceedings is by definition accompanied by many protections in those proceedings themselves. Among others, the alien enjoys notice of and an opportunity to dispute the charges against him; the ability to seek continuances; the ability to seek relief or protection from removal even if he is deportable or inadmissible; adjudication by an immigration judge (IJ); and several layers of appellate review. For detained aliens, the passage of time in those proceedings typically reflects the alien's decision to avail himself of these protections, not the lack of process.

In addition, procedures suitably tailored to each subclass of aliens in this case are available for review of detention: Parole consideration for aliens seeking admission detained under Section 1225(b); "*Joseph* hear-

ings" for criminal aliens detained under Section 1226(c); and bond hearings for aliens detained under Section 1226(a). Such aliens in immigration detention are permitted by the government to end removal proceedings, at any time, by accepting a removal order or, in some cases, by simply returning to their native lands. The asylum laws provide additional protections for aliens who fear persecution or torture if they were to return to their native lands. And to minimize interim detention when aliens choose to litigate, the Executive Office for Immigration Review (EOIR) expedites removal proceedings for detained aliens.

For years, the vast majority of removal proceedings for detained aliens have ended long before the six-month mark. And although the class here consists solely of aliens whose proceedings lasted six months or longer, the record shows that those proceedings were typically closer to their end than the beginning. Moreover, class members here were virtually always found removable and usually ordered removed.

II. In light of this, as even the court of appeals recognized, the Due Process Clause does not require bond hearings every six months for all individuals detained under Section 1225(b). Rather, as the court concluded, detention incident to removal proceedings under Section 1225(b) is "clearly" constitutional in "likely the vast majority" of circumstances. Pet. App. 86a. All of the aliens at issue here are placed in removal proceedings before an IJ; the government allows them to end that detention at any time by accepting an order of removal or, in some instances, simply by returning to their native lands; the government expedites proceedings to minimize detention for those who remain; release on parole is a possibility; and Congress has provided

added protections for the subset who fear persecution or torture.

Whatever due process might require in this context, this framework easily suffices as a facial matter. In virtually all cases, Section 1225(b) is applied to aliens seeking initial entry. This Court "has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982). In unusual circumstances, Section 1225(b) can also apply to lawful permanent residents (LPRs) returning from abroad. But in any extraordinary circumstances, case-specific issues can be appropriately addressed in an as-applied challenge. There is no basis for the broad, unbending six-month rule adopted by the courts below.

III. The same is true for criminal or terrorist aliens under Section 1226(c). In *Demore* v. *Kim*, 538 U.S. 510 (2003), this Court affirmed the mandatory detention pending removal proceedings of a criminal alien for longer than six months, where he would be returned to additional detention on remand until his proceedings were completed. That decision implicitly forecloses a six-month rule.

As *Demore* itself illustrates, the mere passage of six months in removal proceedings does not demonstrate that interim detention of a criminal alien under Section 1226(c) no longer "serve[s] its purported immigration purpose." 538 U.S. at 527. Rather, such detention will virtually always serve those purposes for the full duration of removal proceedings. A criminal alien's danger to the community will typically remain constant, and the government's interest in retaining custody over

the alien to effectuate removal will usually increase over time. That interest is particularly strong when an order of removal is about to be entered, and stronger still when an order of removal has already been entered and the alien is pursuing appellate review. That is also when a criminal alien's incentives to flee are particularly high.

Criminal aliens detained under Section 1226(c), moreover, have substantially decreased liberty interests. The criminal offense that renders those aliens subject to mandatory detention also makes those aliens removable and, in the end, the government's charges are virtually always sustained. To be sure, criminal aliens often seek discretionary relief from removal. But they have a diminished claim to be at liberty while the Attorney General or Secretary of Homeland Security considers whether to exercise that discretion to allow them to remain in this country notwithstanding their past crimes that render them removable. Moreover, when a criminal alien has been ordered removed by the IJ or the Board of Immigration Appeals (BIA) but then himself seeks further review, he again has a diminished claim to be at liberty inside the United States during the time needed to adjudicate his appeal.

Nor can the pace of removal proceedings be measured with a rigid six-month yardstick. The duration of removal proceedings is inherently elastic, because it depends on myriad factors, including an alien's decisions to seek continuances, relief from removal, or appellate review. This Court has rejected an inflexible six-month deadline under the Speedy Trial Clause for similar reasons: A court "cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate," *Barker* v. *Wingo*, 407 U.S.

514, 521 (1972), and a rigid six-month deadline "would require this Court to engage in legislative or rulemaking activity," *id.* at 523. So too here.

A one-size-fits-all rule would also create a perverse incentive for criminal aliens detained under Section 1226(c) to prolong their removal proceedings in the hope of obtaining a bond hearing and the possibility of release into the United States that would otherwise be prohibited. Here, for example, a substantially larger portion of class members overall were granted bond (and released) than were permitted to remain in the United States at the end of their proceedings. Consequently, in some cases, a criminal alien's best chance of remaining will be by obtaining release on bond pending the conclusion of their removal proceedings, during which they may abscond. Congress made detention mandatory, however, because experience showed that individualized screening of criminal aliens was ineffective at preventing flight and protecting the safety of the community. And once again, any extraordinary cases can be addressed in as-applied challenges tailored to the facts and circumstances of the particular case. There is no basis for the inflexible rule adopted by the courts below.

IV. It follows *a fortiori* that the Due Process Clause does not impose an unbending requirement that the government conduct bond hearings—automatically every six months no matter what—to justify continued detention pending removal proceedings for aliens detained under Section 1226(a). After all, every alien detained under Section 1226(a) already has had an individualized bond hearing, and may obtain another if circumstances change materially.

The Constitution also provides no basis for requiring the government to bear the burden of proving that the alien will be a flight risk or a danger—much less to do so by clear-and-convincing evidence. Indeed, this Court has consistently upheld detention pending removal proceedings notwithstanding that the government has *never* borne a clear-and-convincing burden.

Finally, even if due process did require a bond hearing at the six-month mark, the length of detention would be irrelevant to determining whether bond would be appropriate. Rather, the relevant factors to consider are flight risk and danger to the community. Those risks do not diminish, and, indeed, may well increase as removal proceedings near their end and removal becomes imminent. The Due Process Clause therefore does not require IJs, as a substantive matter, to consider the length of detention as a factor weighing in favor of release.

ARGUMENT

I. Extensive Safeguards Exist To Protect Against Arbitrary Deprivations Of Liberty

A. Removal Proceedings Provide Extensive Protections Against Arbitrary Deprivations Of Liberty

1. When an alien is detained incident to removal proceedings under 8 U.S.C. 1229a, those proceedings themselves supply extensive safeguards against the arbitrary deprivation of liberty. An alien seeking admission at our Nation's borders cannot be placed into removal proceedings under Section 1229a in the first place if he is "clearly and beyond a doubt entitled to be admitted." 8 U.S.C. 1225(b)(2)(A). And if he is placed into removal proceedings, he may defeat the charge by demonstrating that he is "clearly and beyond doubt

entitled to be admitted" or "lawfully present in the United States pursuant to a prior admission." 8 U.S.C. 1229a(c)(2)(A) and (B).

When an alien is already admitted to the United States, the government generally cannot initiate removal proceedings without a warrant or notice to appear, 8 U.S.C. 1229(a), and the government bears the burden of proving by clear-and-convincing evidence that he is deportable, 8 U.S.C. 1229a(c)(3). And even if an alien is removable, he may apply for various forms of relief or protection from removal, such as asylum, withholding of removal, or cancellation of removal, which would permit the alien to remain in the United States notwithstanding that he lacks any right to live here. *E.g.*, 8 U.S.C. 1158(a), 1229b, 1231(b)(3).[1]

The decision whether to order such an alien removed is made by an IJ in EOIR in the Department of Justice. 8 U.S.C. 1101(b)(4), 1229a(a)(1). IJs must inform aliens of certain forms of eligibility for relief. For example, if an alien expresses fear of persecution or harm upon return, an IJ must advise him that he may apply for asylum or withholding of removal. 8 C.F.R. 1240.11(c)(1).

Aliens may obtain continuances "for good cause shown." 8 C.F.R. 1003.29. They have a right to the counsel of their choice at no expense to the government, 8 U.S.C. 1229a(b)(4)(A); the right to testify; and the right to "examine the evidence against the alien," "to present evidence," and "to cross-examine witnesses presented by the Government," subject to an exception for disclosure of certain national-security information, 8 U.S.C. 1229a(b)(4)(B); see 8 C.F.R. 1240.7(a), 1240.46(c).

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[1] For simplicity, this brief uses the word "relief" to refer to both relief from removal and protection from removal.

Aliens ordered removed may ask the IJ to reconsider that determination. 8 U.S.C. 1229a(c)(6). They are also informed that they have a right to appeal. 8 U.S.C. 1229a(c)(5); 8 C.F.R. 1003.1(b), 1003.38(a). If an alien appeals and the BIA enters a final order of removal, the alien may file a petition for review in a court of appeals, 8 U.S.C. 1252, and seek review in this Court, 28 U.S.C. 1254(1).

2. "Expedited removal" (ER) exists for certain aliens who are clearly removable: (1) aliens arriving at a port of entry who lack valid documentation or who seek to enter via fraud; and (2) certain other aliens who entered illegally without valid documentation or via fraud, have been present less than two years, and were designated by the Secretary for ER. 8 U.S.C. 1225(b)(1)(A)(i) and (iii); see 69 Fed. Reg. 48,880 (Aug. 11, 2004) (designating aliens encountered within 14 days of the unlawful entry and 100 miles of the border); 67 Fed. Reg. 68,924-68,926 (Nov. 13, 2002) (arrivals by sea). Ordinarily, such aliens are ordered removed without a further hearing. 8 U.S.C. 1225(b)(1)(A)(i). Respondents concede (Br. 2-4) that ER is not at issue here.

Congress, moreover, added special protections for aliens who are subject to ER but seek asylum or claim a fear of persecution or torture. See 8 U.S.C. 1225(b)(1)(A)(ii) and (B); see also 8 U.S.C. 1158, 1231(b)(3).[2] In such a case, a U.S. Citizenship and Immigration Services (USCIS) asylum officer will interview the alien to determine whether the asserted fear is credible. 8 U.S.C. 1225(b)(1)(A)(ii). If the asylum officer finds it is not credible, he must inform the alien

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[2] Special protections also exist for LPRs, refugees, asylees, and individuals claiming U.S. citizenship. See 8 U.S.C. 1225(b)(1)(C); 8 C.F.R. 235.3(b)(5).

that he can request a review by an IJ, which must occur "as expeditiously as possible" and within seven days. 8 U.S.C. 1225(b)(1)(B)(iii)(III); see 8 C.F.R. 235.3(b)(4)(i)(C). If the asylum officer's decision stands, the alien is to be removed forthwith through ER. 8 U.S.C. 1225(b)(1)(B)(iii)(I). If the alien's fear is found credible, however, he is placed into removal proceedings before an IJ to consider whether to grant asylum or similar relief. 8 C.F.R. 208.30(e)(5), 235.6(a); see 8 U.S.C. 1225(b)(1)(B)(ii).

B. Suitably Tailored Mechanisms Exist To Address Detention Of The Aliens Here

1. The statutory and regulatory framework furnishes mechanisms, tailored to the status of the alien, in which questions concerning custody during removal proceedings may be addressed.

Section 1225(b): Parole. The Section 1225(b) subclass consists of aliens in removal proceedings and incident detention, for six months, under two of its subsections: (b)(1)(B)(ii) and (b)(2)(A). Resps. Br. 2-4. The first category consists of aliens arriving at a port of entry without valid documentation or seeking to enter through fraud, but who passed the credible-fear screening process and are in removal proceedings (not ER). 8 C.F.R. 208.30(e)(5); see 8 U.S.C. 1225(b)(1)(B)(ii). The second category consists of other aliens seeking admission to the United States who have not demonstrated upon their arrival that they are "clearly and beyond a doubt entitled to be admitted." 8 U.S.C. 1225(b)(2)(A).

Aliens in both categories "shall be detained" during the proceedings to determine whether they will be admitted or instead ordered removed. 8 U.S.C. 1225(b)(1)(B)(ii) and (2)(A). Any alien detained under

either provision nonetheless may request that the Secretary parole him into the United States "on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. 1182(d)(5)(A); see 8 C.F.R. 212.5, 235.3(c).[3] Like release on bond, release on parole can allow the alien to live inside the United States during his proceedings.

Section 1226(c): Joseph *Hearings.* Section 1226(c) mandates that certain criminal and terrorist aliens be detained pending removal proceedings. 8 U.S.C. 1226(c). When a U.S. Immigration and Customs Enforcement (ICE) officer determines that an alien is subject to such mandatory detention, the alien is informed of the decision and that he may challenge it via a "*Joseph* hearing." 8 C.F.R. 1003.19(h)(2)(ii); *Demore* v. *Kim*, 538 U.S. 510, 514 & n.3 (2003). At a *Joseph* hearing, the IJ determines whether the alien is "properly included" in a mandatory-detention category. 8 C.F.R. 1003.19(h)(2)(ii). "[T]he detainee may avoid mandatory detention by demonstrating that he is not an alien, was not convicted of the predicate crime, or that the [government] is otherwise substantially unlikely to

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[3] For aliens in the first category (*i.e.*, arriving aliens with a credible fear of persecution), U.S. Immigration and Customs Enforcement has had a policy to consider parole automatically and ordinarily to release the alien unless he fails to provide sufficient evidence of his identity or fails to show that he will not be a flight risk or danger. J.A. 48-50; see Gov't Br. 28-29. On January 25, 2017, the President issued an Executive Order directing the Secretary, *inter alia*, to ensure that parole authority "is exercised only on a case-by-case basis in accordance with the plain language" of 8 U.S.C. 1182(d)(5), "and in all circumstances only when an individual demonstrates urgent humanitarian reasons or a significant public benefit derived from such parole." Exec. Order, *Border Security and Immigration Enforcement Improvements* § 11(d).

establish that he is in fact subject to mandatory detention." *Demore*, 538 U.S. at 514 n.3; see *In re Joseph*, 22 I. & N. Dec. 799 (B.I.A. 1999). Aliens with criminal convictions also have had the procedural protections of the criminal proceeding itself. Those include the right to counsel who must advise the defendant of possible immigration consequences of a conviction under existing law before an alien pleads guilty. *Padilla* v. *Kentucky*, 559 U.S. 356, 360 (2010).

An alien may appeal an adverse *Joseph* decision to the BIA. 8 C.F.R. 236.1(d)(3). If the alien prevails, Section 1226(c) will not apply and the alien will be eligible for release on bond under Section 1226(a). Thus, whenever a criminal alien remains detained under Section 1226(c), he has either forgone a *Joseph* hearing, or the IJ (or BIA) has found, on an individualized basis, "at least some merit to the [government's] charge." *Demore*, 538 U.S. at 531 (Kennedy, J., concurring).

Section 1226(a): Bond Hearings. Section 1226(a) governs the detention and release of other aliens arrested inside the United States. 8 U.S.C. 1226(a). This encompasses aliens in a wide variety of circumstances, including those who are present after entering illegally; aliens who were lawfully admitted but overstayed a visa; and aliens who committed a crime that rendered them removable (but not subject to mandatory detention).[4] See 8 U.S.C. 1227.

Every such alien is individually considered for release on bond. 8 C.F.R. 236.1(c)(8). An ICE officer

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[4] This category also currently includes aliens who entered illegally without valid travel documentation or via fraud, were caught within 14 days of entering illegally and within 100 miles of a U.S. land border, and were found to have a credible fear. *In re X-K-*, 23 I. & N. Dec. 731, 732-735 (B.I.A. 2005); see Gov't Br. 18 n.5.

assesses whether the alien has "demonstrate[d]" that "release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding." *Ibid.* If the officer denies bond (or sets a bond the alien thinks is too high), the alien may ask an IJ for a redetermination of the custody decision. 8 C.F.R. 236.1(d)(1), 1003.19, 1236.1(d)(1).

The alien may appeal the IJ's custody redetermination to the BIA. 8 C.F.R. 236.1(d)(3)(i), 1236.1(d)(3)(i). An alien who remains detained under Section 1226(a) may later obtain another custody determination whenever "circumstances have changed materially since the prior bond redetermination." 8 C.F.R. 1003.19(e).

2. Of course, the government allows aliens in immigration detention pending removal proceedings to end those proceedings, at any time, by accepting a final order of removal, qualifying for voluntary departure, or, in some circumstances, by simply returning home. But an alien who files a petition for review in a court of appeals after the BIA has entered a final order of removal has an additional option: He can forgo seeking a stay of removal, depart or be removed, and continue to challenge the removal order from abroad. See *Nken* v. *Holder*, 556 U.S. 418, 424 (2009). If the alien ultimately prevails, ICE's policy is, "[a]bsent extraordinary circumstances," to "facilitate the alien's return to the United States" when the decision either restores the alien to LPR status "or the alien's presence is necessary for continued administrative removal proceedings." ICE, *Facilitating the Return to the United States of Certain Lawfully Removed Aliens*, Directive No. 11061.1, at ¶ 2 (Feb. 24, 2012).

C. EOIR Expedites Removal Proceedings For Detained Aliens

To avoid unnecessary detention pending removal proceedings, EOIR prioritizes adjudication of cases involving detained aliens. See Dep't of Justice, *Administrative Review and Appeals: FY 2017 Performance Budget, Congressional Budget Submission* 19 (*EOIR Budget Request*). ICE policy is similarly for its attorneys to seek continuances in detained cases only when "absolutely necessary," and to seek to expedite any applications for adjustment of status or other relief that the alien might choose to file with USCIS during removal proceedings. Office of the Principal Legal Advisor, ICE, *Continuances and Briefing Extensions Before EOIR* (July 1, 2014); see ICE, *Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions* 1-3 (Aug. 20, 2010).

As a result, for example, IJs typically completed non-appealed cases in fiscal year 2001 involving aliens in immigration detention, with charges that can trigger mandatory detention under Section 1226(c), in substantially less than 90 days. *Demore*, 538 U.S. at 529-531; Gov't *Demore* Letter 1-3 (median of 15 days). In the small fraction of such detained criminal cases where there was an appeal, the BIA typically completed the appeal in about four months, with a typical overall time of about nine months to complete both stages of review. Gov't *Demore* Letter 2-3 (medians of 119 days and 272 days, respectively).

EOIR has published statistics reporting similar rates for each fiscal year from 1999 through 2015: Each year, EOIR has found, the median time for non-appealed cases was well below 90 days, and the median

time to complete both IJ and BIA stages was less than ten months in appealed cases.[5] EOIR has also reported similar figures to Congress regarding IJ completion times (and BIA completion times in appealed cases), from fiscal years 2011 through 2015, for all aliens in immigration detention, not merely criminal aliens subject to mandatory detention under Section 1226(c). *EOIR Budget Request* 18-19.[6]

Even among the class in this case—which consists solely of cases lasting six months or longer—the six-month mark was usually closer to the end than the beginning of proceedings. The government's expert found that removal proceedings and detention for the majority of in-period aliens ended by ten months, J.A. 187 (median 286 days);[7] for two-thirds it ended by one year, J.A. 188; and among the remaining third, more than half were released by sixteen months, *ibid.* He also found that median completion times were considerably longer for those who sought continuances, relief from removal, BIA review, or Ninth Circuit review. See J.A. 136-137, 153, 191, 195-196.

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[5] EOIR, *Certain Criminal Charge Completion Statistics*, Tbls. 1, 3 (Aug. 2016). The averages are longer, *ibid.*, indicating "a short fat tail to the left and a long skinny tail to the right," with some cases taking an unusually long time, J.A. 168.

[6] In ER proceedings, a final removal order is entered essentially immediately. ICE reported that, in fiscal year 2013, it completed nearly 200,000 cases via that process. Office of Immigration Statistics, Dep't of Homeland Sec., *Annual Report, Immigration Enforcement Actions: 2013*, Tbl. 7 (Sept. 2014).

[7] The government's expert focused on "in-period" aliens to correct for a selection bias in the sampled data that skewed the figures upwards. J.A. 140-143. Even without this correction, the six-month mark was usually closer to the end than the beginning. J.A. 187.

D. Class Members Were Usually Found Removable And Ordered Removed

The framework described above affords aliens numerous procedural protections and, in many cases, opportunities to seek relief from removal. Members of the class in this case often availed themselves of those protections and opportunities. For example, the government's expert found that 71.9% of in-period cases involved a request for relief from removal, 29.8% involved a BIA appeal, and 15.7% involved Ninth Circuit review. J.A. 190, 192. The record shows, however, that when class members' cases were completed, the alien was virtually always found removable and usually ordered removed. Fewer than 5% of studied class members with completed cases won a "termination." J.A. 199 (20 of 546 completed in-period cases, or 34 of 840 completed cases overall). That is, more than 95% were found removable and thus to lack any substantive right to be at liberty inside the United States.

More than two-thirds of class members with completed cases were removed, ordered removed, or allowed to voluntarily depart. See J.A. 199 (370 of the 546 in-period completed cases ended in one of those ways, as did 577 of the 840 completed cases for studied class members overall). And among the minority who obtained relief from removal, virtually all obtained discretionary relief: Of the 229 studied class members who obtained relief from removal, J.A. 83, the vast majority (222) obtained discretionary relief, J.A. 79 Tbl. 10 & n.*. Only seven people—less than 1% of studied class members with completed cases—sought or obtained solely mandatory withholding of removal. *Ibid.*

Aliens who appealed almost never prevailed. Respondents' expert found that only 6% of class members

who appealed to the BIA obtained a remand or reversal. J.A. 536. Ninth Circuit review was similarly fruitless. 197 class members filed a petition for review, J.A. 75, and 72 of those remained pending at the time of the expert reports, J.A. 84. Of the 122 completed Ninth Circuit cases, the alien prevailed in only six. J.A. 201 Tbl. L-16 ("All"). Class members who completed BIA review, or both BIA *and* Ninth Circuit review, thus were unsuccessful about 95% of the time.

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As explained below, against this backdrop, the inflexible rule adopted below is plainly not required by the Due Process Clause.

II. The Constitution Does Not Require Bond Hearings Whenever Removal Proceedings (And Detention Incident Thereto Under Section 1225(b)) Last Six Months

Section 1225(b) codifies the rule that has protected our Nation's borders for a century: When an applicant for admission is "not clearly and beyond a doubt entitled" to be admitted, he "shall be detained" pending proceedings to determine whether he should be removed. 8 U.S.C. 1225(b)(2)(A); see Immigration and Nationality Act, ch. 477, Tit. II, § 235(b), 66 Stat. 199; Immigration Act of 1917 (1917 Act), ch. 29, § 16, 39 Stat. 886. Section 1225(b)(1)(B)(ii) similarly mandates interim detention for a subset of aliens who are obviously inadmissible—arriving aliens who lack valid documentation or sought to enter through fraud—who are nonetheless in ongoing IJ removal proceedings (rather than ordered removed immediately via ER) because they have been found to have a credible fear of persecution or torture. 8 U.S.C. 1225(b)(1)(B)(ii). Under either provision, an alien may request that the Secretary release him into the United States on parole. 8 U.S.C.

1182(d)(5); 8 C.F.R. 212.5, 235.3(c). The government also expedites removal proceedings for aliens who remain detained, allows them to end those proceedings at any time by accepting a removal order, and even sometimes by simply returning to their native lands.

Even the court of appeals recognized that Section 1225(b) is "clearly" constitutional as applied to "likely the vast majority" of aliens, without a bond hearing, because those are aliens seeking their initial entry into the United States. Pet. App. 86a. For that category—the core of the government's inherent power to protect the Nation's borders and control immigration—the existing framework affords important procedural protections and plainly comports with the Constitution. The court was instead concerned that Section 1225(b) could potentially give rise to constitutional doubt as applied to an LPR returning from abroad. But that situation is unusual and does not remotely justify an across-the-board requirement of bond hearings at the six-month mark—as a matter of constitutional law—even for all LPRs, much less for all aliens seeking initial entry. Rather, in an outlier case, an alien may bring an as-applied challenge to take into account any such concern.

A. The Constitution Does Not Require Bond Hearings Whenever Incident Detention Of An Alien Seeking Initial Entry Lasts Six Months

1. This Court "has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982). "[T]he Court's general reaffirmations of this principle have been legion." *Kleindienst* v. *Mandel*, 408 U.S. 753, 765-766 (1972); see *Zadvydas* v.

Davis, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."); *Mandel*, 408 U.S. at 767 ("[T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government.") (quoting *Galvan* v. *Press*, 347 U.S. 522, 531 (1954)); *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied [initial] entry is concerned.") (quoting *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950)); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 591 (1952); *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659-660 (1892).

Control of the Nation's borders is vested in the political Branches because it is "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Harisiades*, 342 U.S. at 588-589. "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe." *Nishimura Ekiu*, 142 U.S. at 659.

Interim detention under Section 1225(b) is integral to protecting our Nation's borders. By definition, an alien at the threshold of initial entry who has initially been found "not clearly and beyond a doubt entitled to be admitted," 8 U.S.C. 1225(b)(2)(A), or who is seeking

initial admission without valid documentation or via fraud, 8 U.S.C. 1225(b)(1)(B), lacks any entitlement to enter the United States at that time. The purpose of the removal proceeding at that point is to afford the alien an opportunity to establish that he *is* in fact clearly and beyond a doubt entitled to be admitted, or should be granted asylum or withholding of removal notwithstanding that he is inadmissible. 8 U.S.C. 1229a(c)(2) and (4). Temporary detention in the interim prevents the alien from jumping the gun and being at large inside the United States before those determinations are made. As the Court put it "more than a century ago," removal proceedings "would be vain if those accused could not be held in custody pending the inquiry into their true character." *Demore*, 538 U.S. at 523 (quoting *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896)).

Furthermore, by definition, an alien seeking initial entry lacks any constitutionally cognizable interest in being released into the United States while doubts about his status are resolved. In contemplation of law, that alien is outside the United States. Cf. *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) ("[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."). To put it another way, when an alien is seeking initial entry, detaining him incident to removal proceedings preserves the status quo and is necessary to effectuate the alien's continued exclusion until he affirmatively establishes in those proceedings that he should be permitted to enter for the first time. Requiring the release of the alien into the United States before that determination has been made, by contrast, would de-

feat that purpose and put him into a position where he could cause the harms to public health, safety and security, and the labor markets that Congress enacted the immigration laws to prevent. See 8 U.S.C. 1182(a).

Congress has authorized the Secretary to release such an alien into the United States on parole, "on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. 1182(d)(5)(A). But Congress has entrusted that important discretionary decision—whether to allow such an alien into the United States before he has been determined to be admissible —to the Secretary, *ibid.*, who is charged with "[p]reventing the entry of terrorists," "[s]ecuring the borders," "[c]arrying out [certain] immigration enforcement functions," and establishing rules governing parole, 6 U.S.C. 202(1)-(4); see 8 U.S.C. 1103(a)(5) (Secretary "shall have the power and duty to control and guard the boundaries and borders of the United States against illegal entry of aliens.").

This constellation of measures—including the removal hearing itself, the credible-fear screening process, the possibility of parole, and expedited treatment for those who remain in custody—affords meaningful protection for aliens arriving at our borders and seeking to enter for the first time.

2. Respondents have provided no basis for interpreting the Constitution itself to impose an inflexible mandate of IJ bond hearings at the six-month mark for such aliens, thereby upending the longstanding statutory and constitutional framework governing control of the borders. Respondents contend (Br. 29-30) that *Mezei* is anachronistic. But the "distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immi-

gration law." *Zadvydas*, 533 U.S. at 693; cf. *id.* at 682 (noting that "[a]liens who have not yet gained initial admission to this country would present a very different question"). This Court has repeatedly rebuffed requests to reconsider that distinction. See *Mandel*, 408 U.S. at 765-767 ("We are not inclined in the present context to reconsider this line of cases."); *Galvan*, 347 U.S. at 531 ("As to the extent of the power of Congress under review, there is not merely 'a page of history,' but a whole volume.") (citation omitted).

Indeed, it follows *a fortiori* from this Court's precedents that there is no constitutional basis for requiring bond hearings, and possible release into the United States, at the six-month mark for aliens first arriving at the Nation's borders. *Mezei* involved the indefinite detention of an alien who the Court found to be on the threshold of initial entry (an LPR returning from a nearly two-year trip abroad) who was taken into custody when he arrived at our shores. 345 U.S. at 207-209. He was denied notice of or opportunity to dispute the basis for his exclusion, on national-security grounds, and was unable to depart because his home countries refused to "take him back." *Id.* at 207. Yet relying on the principles above, the Court concluded that his "continued exclusion [does not] deprive[] him of any statutory or constitutional right." *Id.* at 215. Four Justices dissented on the ground that, in their view, the Due Process Clause required the government to provide Mezei notice of and opportunity to dispute the basis for his exclusion. *E.g.*, *id.* at 218 (Black, J., dissenting); *id.* at 227 (Jackson, J., dissenting). But no Justice contended that he had a right to enter the United States during the time needed to effectuate his exclusion, or a right to a bond hearing with the possibility of

release into the United States in the interim. To the contrary, Justice Jackson agreed that "[d]ue process does not invest any alien with a right to enter the United States." *Id.* at 222.

This broad class action also provides no basis for addressing the proper resolution of outlier cases, because the existing framework for aliens seeking initial entry provides greater procedural protections, and imposes less onerous restrictions, than those at issue in *Mezei*. Unlike the alien in *Mezei*, "likely the vast majority" of aliens detained under Section 1225(b) have never had LPR status. Pet. App. 86a. Unlike in *Mezei*, the detention here is not open-ended. It is inherently temporary because it has an "obvious termination point"—the completion of removal proceedings—that comes in every case. *Demore*, 538 U.S. at 529 (quoting *Zadvydas*, 533 U.S. at 697). The government expedites detained cases to minimize the time it will take to get to that inevitable end. See pp. 14-16, *supra*. Unlike in *Mezei*, the aliens here are in removal proceedings that provide the notice and opportunity to be heard the *Mezei* dissenters concluded were necessary. *E.g.*, 345 U.S. at 222-223 (Jackson, J., dissenting).[8] Unlike in *Mezei*, virtually all aliens detained pending removal proceedings can end detention by returning to their native lands. The asylum laws and credible-fear process, moreover, provide added protection for the subset of newly arriving aliens who fear returning because of possible persecution or torture. See pp. 9-10, *supra*. And parole is available in the meantime, "on a case-by-case basis for urgent humani-

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[8] National-security limitations on disclosure in particular cases are not at issue here. See 8 U.S.C. 1229a(b)(4)(B).

tarian reasons or significant public benefit." 8 U.S.C. 1182(d)(5)(A).

A constitutional mandate that *all* such aliens must be given bond hearings, whenever proceedings last six months, would leave an "unprotected spot in the Nation's armor," *Zadvydas*, 533 U.S. at 695-696 (quoting *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 602 (1953)), that Congress could not close. It would create a powerful incentive for aliens to come to the United States and then prolong removal proceedings in the hope of obtaining a bond hearing and thereafter entering the United States. And it would effectively convert the many protections incorporated into removal proceedings into a mechanism the alien could use to enter the United States. By seeking continuances, relief from removal, appealing, or otherwise prolonging litigation to the six-month mark, the alien would gain a right to a bond hearing and in turn the possibility of entering the United States over the Secretary's objection. Moreover, because the bond mandate would stem from the Constitution itself, Congress could not change it. That cannot be right.

B. The Constitution Does Not Require Bond Hearings Whenever Incident Detention Of A Returning LPR Under Section 1225(b) Lasts Six Months

The court of appeals imposed an across-the-board mandate of bond hearings at the six-month mark under Section 1225(b), as a matter of statutory interpretation, out of concern that Section 1225(b) could, in unusual cases, give rise to constitutional doubt as applied to an LPR returning from abroad. Pet. App. 41a-45a. But even the court did not contend that the Constitution itself mandated a six-month rule for all such LPRs, much less for all aliens seeking admission.

LPRs have a series of protections against detention under Section 1225(b). A verified LPR is wholly exempt from being placed into ER proceedings under Section 1225(b)(1), see 8 C.F.R. 235.3(b)(5)(ii), and is generally exempt from detention under Section 1225(b)(2)(A). That latter provision applies only to an "applicant for admission," 8 U.S.C. 1225(b)(2)(A), and Congress has provided that LPRs "shall not be regarded" as applicants for admission unless the government proves, by clear-and-convincing evidence, that one of six narrow exceptions applies, 8 U.S.C. 1101(a)(13)(C); see *In re Rivens*, 25 I. & N. Dec. 623, 625-626 (B.I.A. 2011).[9]

Moreover, in the unusual circumstance where an LPR could lawfully be regarded as an applicant for admission and thus subject to detention under Section 1225(b), that treatment would virtually always be constitutional. There is no constitutional problem with assimilating an LPR to the status of a new entrant when he (1) has "abandoned or relinquished" his lawful status; (2) has been continually absent from the country for more than 180 days, as in *Mezei*; (3) has departed the country during removal proceedings; or (4) attempted to enter outside a designated port of entry. 8 U.S.C. 1101(a)(13)(C)(i), (ii), (iv), and (vi).

The only two remaining exceptions involve criminality. 8 U.S.C. 1101(a)(13)(C)(iii) and (v). Congress has provided that a returning LPR may be treated as a new arrival if he has committed a criminal offense that

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[9] On January 27, 2017, the President, pursuant to his distinct statutory authority under 8 U.S.C. 1182(f), has temporarily suspended the entry of aliens from certain countries, subject to certain exceptions. Exec. Order, *Protecting the Nation from Foreign Terrorist Entry into the United States* § 5(c) and (g). The Executive Order is not at issue in this case.

renders him inadmissible under 8 U.S.C. 1182(a)(2). 8 U.S.C. 1101(a)(13)(C)(v). But such an offense also triggers mandatory detention under Section 1226(c), see 8 U.S.C. 1226(c)(1)(A), which this Court upheld in a case involving an LPR inside the United States who was detained for more than six months, *Demore*, 538 U.S. at 531. It follows *a fortiori* that similar treatment is facially constitutional under Section 1225(b)(2)(A) for an LPR who has left the United States and is seeking to return. Treating a returning LPR as a new arrival would be similarly constitutional under *Demore* if, under the last exception, the LPR sought to return after committing a similar offense after departing the United States. See 8 U.S.C. 1101(a)(13)(C)(iii). An LPR who is returning to the United States with cocaine in his luggage, for example, does not have a greater interest in being released into the United States in the interim than an LPR who was already at liberty inside the United States but then committed a similar crime that makes him subject to mandatory detention under Section 1226(c).

Finally, for the reasons set forth below concerning criminal aliens detained under Section 1226(c), see pp. 27-47, *infra*, any outlier cases involving LPRs under 8 U.S.C. 1101(a)(13)(C) cannot support an across-the-board requirement of bond hearings at the six-month mark under Section 1225(b). Rather, in any exceptional case, an LPR can bring an as-applied constitutional challenge in an individual habeas action, where a court can consider the facts and circumstances of that particular case. There is no basis for the broad and inflexible rule adopted by the courts below.

III. The Constitution Does Not Require Bond Hearings Whenever Removal Proceedings For Criminal Aliens (And Detention Incident Thereto Under Section 1226(c)) Last Six Months

It is well-established that "detention during deportation proceedings [i]s a constitutionally valid aspect of the deportation process." *Demore*, 538 U.S. at 523. In every case in which detention incident to removal proceedings has arisen, the Court has concluded that it is constitutional. *Ibid.*; see *Reno* v. *Flores*, 507 U.S. 292, 306 (1993) ("Congress has the authority to detain aliens suspected of entering the country illegally pending their deportation hearings."); *Carlson* v. *Landon*, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of this deportation procedure."); *Wong Wing*, 163 U.S. at 235 ("We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid."). And in *Demore*, the Court squarely rejected a constitutional challenge to Section 1226(c), which mandates detention of certain criminal and terrorist aliens pending removal proceedings, without the opportunity for release on bond. The Court affirmed Congress's categorical judgment, holding that "Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as [the LPR in that case] be detained for the brief period necessary for their removal proceedings." *Demore*, 538 U.S. at 513.

A. The Constitution Provides No Basis For A Rigid Six-Month Rule

The Due Process Clause does not render Section 1226(c) unconstitutional whenever removal proceedings, and the detention that is an integral part of those proceedings, last six months.

1. Demore *upheld Section 1226(c) as applied to a criminal alien whose removal proceedings already lasted more than six months*

At the outset, in *Demore* itself, the alien had already "spen[t] six months" in immigration custody before this Court upheld the constitutionality of his mandatory detention. 538 U.S. at 531; see Gov't Br. 35-36 & n.11. And as a result of the Court's reversal of the decision affirming his release, he was to be returned to custody until removal proceedings were completed, which would take additional time. He had not yet had his removal hearing (because he asked for a continuance), and he could still appeal to the BIA if the IJ ordered him removed. *Demore*, 538 U.S. at 530-531; see Am. Immigration Council et al. Amicus Br. 8 n.4 (stating that the alien was detained ten more months). *Demore* itself thus "implicitly foreclose[s]" the notion that the Constitution mandates a bond hearing at the six-month mark under Section 1226(c). *Reid* v. *Donelan*, 819 F.3d 486, 497 (1st Cir. 2016).

Demore also rejected the analogy to *Zadvydas* that had been the basis for some courts to require bond hearings at the six-month mark under Section 1226(c) as a matter of statutory interpretation. See *Demore*, 538 U.S. at 516 (abrogating *Welch* v. *Ashcroft*, 293 F.3d 213 (4th Cir. 2002)). *Demore* explained that the two situations were "materially different." *Id.* at 527. First, the Court determined that the detention in *Zad-*

vydas no longer "serve[d] its purported immigration purpose." *Ibid.* Aliens are detained after they are ordered removed in order to effectuate their removal, but in *Zadvydas* removal was "no longer practically attainable." *Ibid.* (quoting *Zadvydas*, 533 U.S. at 690). Other countries had refused to accept the aliens, so there was no country to which to return them. See *Zadvydas*, 533 U.S. at 684, 702. By contrast, this Court emphasized in *Demore* that detention of criminal aliens "*pending their removal proceedings* * * * necessarily serves the purpose of preventing [them] from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." 538 U.S. at 527-528; see *id.* at 528 (discussing evidence that "large numbers of deportable criminal aliens skipp[ed] their hearings and remain[ed] at large in the United States unlawfully").

Second, *Zadvydas* involved "indefinite" and "potentially permanent" detention because it "ha[d] no obvious termination point." *Demore*, 538 U.S. at 528-529 (quoting *Zadvydas*, 533 U.S. at 690-691, 697). By contrast, as this Court emphasized in *Demore*, "*detention pending a determination of removability*" is inherently temporary because it has an "obvious termination point": the end of removal proceedings. *Id.* at 529 (quoting *Zadvydas*, 533 U.S. at 697). Removal proceedings always end, and the government expedites removal proceedings for detained aliens to promote their timely conclusion. See pp. 14-16, *supra*.

It follows *a fortiori* that the Constitution itself does not impose a six-month limitation on mandatory detention under Section 1226(c). *Zadvydas* imposed a six-month presumption as a matter of statutory interpre-

tation, not as a constitutional mandate. 533 U.S. at 699. The justifications for adopting that presumption in *Zadvydas* are absent here because the two cases are "materially different." *Demore*, 538 U.S. at 527. And the Court in *Zadvydas* did not suggest that the Due Process Clause itself imposed a six-month limitation on the duration of mandatory immigration custody as a general matter. Rather, the Court concluded that six months was a "presumptively reasonable" time during which detention after entry of a final order of removal continued to serve the particular immigration purpose at issue there: to effectuate the final order that the alien be removed. *Zadvydas*, 533 U.S. at 701. And even then, there was no rigid six-month rule or requirement of a bond hearing. The alien could continue to be detained beyond that point, without a bond hearing, if he failed to provide good reason to believe that there was no significant likelihood of removal in the reasonably foreseeable future. *Ibid.*

2. The justifications for detaining a criminal alien during his removal proceedings continue for the full duration of those proceedings

Mandatory detention of a criminal alien under Section 1226(c) during removal proceedings is constitutional where it continues to "serve its purported immigration purpose." *Demore*, 538 U.S. at 527 (citing *Zadvydas*, 533 U.S. at 690); see *Flores*, 507 U.S. at 306; *Carlson*, 342 U.S. at 540; *Wong Wing*, 163 U.S. at 235-236; see also *Demore*, 538 U.S. at 532 (Kennedy, J., concurring). As *Demore* itself illustrates, that detention mandate does not cease to be justified whenever the removal proceedings to which the detention is tied last six months.

a. First, the government's interest in effectuating removal of a criminal alien if he is ordered removed at the end of the proceedings does not dissipate at the six-month mark (or any other fixed point). It cannot be conclusively established until the end of removal proceedings whether an alien will be ordered removed, because those proceedings are the "sole and exclusive" means for making that determination. 8 U.S.C. 1229a(a)(3). The prospect of removal, and the government's interest in effectuating it, thus remain concrete throughout.

Furthermore, the risk that a criminal alien will commit further crimes or otherwise present a danger to the community if released will ordinarily remain constant until removal proceedings are completed. There is no reason to believe that risk would dissipate at six months in any one case, much less in every case. Similarly, the risk that a criminal alien, if released, will fail to appear for removal proceedings does not dissipate at the six-month mark. Indeed, the government's interest in keeping the alien in custody (and the alien's incentive to abscond) will typically *increase* over time as removal proceedings progress towards their completion and the likely conclusion that the alien will be ordered removed. See pp. 16-17, *supra*. A criminal alien on the cusp of removal has a greater incentive to abscond than one who is at the beginning of his proceedings.

Section 1226(c) also does not cease to be justified when a criminal alien makes choices during the proceedings that necessarily add time to the resolution of his case—and therefore to the detention that Congress found to be a necessary aspect of those proceedings. For example, in *Demore*, the alien's "removal hearing

was scheduled to occur" after five months, but the Court noted that "[he] requested and received a continuance to obtain documents relevant to his withholding application." 538 U.S. at 531 n.15. The Court thus regarded the additional detention time added by the alien's continuance as fully justified.

The Court further noted that, if a criminal alien decided to appeal to the BIA, that typically added about four months to removal proceedings—and thus to the accompanying detention under Section 1226(c). See *Demore*, 538 U.S. at 529. But the Court similarly treated the added detention time reasonably consumed in disposing of the appeal as fully justified. "As we have explained before," the Court stated, "'the legal system . . . is replete with situations requiring the making of difficult judgments as to which course to follow,' and, even in the criminal context, there is no constitutional prohibition against requiring parties to make such choices." *Id.* at 530 n.14 (quoting *McGautha* v. *California*, 402 U.S. 183, 213 (1971)); see *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 30-31 (1973).

Justice Kennedy's concurrence in *Demore* reflects a similar understanding. Justice Kennedy joined the majority opinion and further explained that, in his view, an LPR "could be entitled" to a bond hearing "if the continued detention became unreasonable or unjustified." 538 U.S. at 532. But he viewed the constitutionality of continuing detention without a bond hearing as depending on why detention is continuing: If there were an "unreasonable delay *by the [Immigration and Naturalization Service (INS)]* in pursuing and completing deportation proceedings," he explained, it "could become necessary" to ask whether "the detention is not to facilitate deportation, or to protect against risk of

flight or dangerousness, *but to incarcerate for other reasons*." *Id.* at 532-533 (emphases added).

Justice Kennedy could not draw such an inference, however, "from the circumstances of" *Demore* itself. 538 U.S. at 533. The clear implication is that the reasonable continuation of removal proceedings occasioned by an alien's choices—including seeking continuances, relief from removal, or appellate review—does not undermine the constitutionality of detention. So long as the added time is reasonably needed to adjudicate the case (not prolonged pointlessly or to punish), the ongoing detention continues to be constitutionally justified by the interests in "protect[ing] against risk of flight or dangerousness." *Id.* at 532-533.

b. Respondents assert that *Demore* is a "narrow exception to the general rule that civil detention may be imposed only after an individualized hearing as to danger and flight risk." Resps. Br. 12 (citing *Foucha* v. *Louisiana*, 504 U.S. 71, 81-83 (1992), and *United States* v. *Salerno*, 481 U.S. 739, 750 (1987)); see *id.* at 13 (citing *Addington* v. *Texas*, 441 U.S. 418 (1979)). The principal dissent in *Demore* made a similar argument relying on the same non-immigration cases. See 538 U.S. at 547-551 (Souter, J., concurring in part and dissenting in part). But the Court instead concluded that the relevant precedents were those "firmly and repeatedly endors[ing] the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens." *Id.* at 522 (collecting cases); see *Zadvydas*, 533 U.S. at 718 (Kennedy, J., dissenting) ("The liberty rights of the aliens before us here are subject to limitations and conditions not applicable to citizens."). That is because "[t]he power to expel aliens" is "essentially a power of the political branches of

government." *Carlson*, 342 U.S. at 537. So long as "aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders." *Id.* at 534.

Even beyond that fundamental distinction, *Foucha*, *Addington*, and *Salerno* do not support bond hearings at the six-month mark. *Foucha* and *Addington* involved freestanding civil-detention regimes, not detention that is a reasonable incident to a separate adjudication—here, to serve the vital government interests in enforcement of the immigration laws and removal of criminal aliens. *Foucha* and *Addington* also involved detention that was indefinite and potentially permanent. *Foucha*, 504 U.S. at 82 ("indefinite"); *Addington*, 441 U.S. at 420 ("indefinite"). Mentally ill individuals were committed to a hospital for treatment, which might never end. *Ibid.* By contrast, the detention here is inherently temporary. "*[D]etention pending a determination of removability*" has an "obvious termination point" that comes in every case: the end of removal proceedings. *Demore*, 538 U.S. at 529 (quoting *Zadvydas*, 533 U.S. at 697). The government expedites detained cases to reach that inevitable end in a timely manner. See pp. 14-16, *supra*. Moreover, in *Addington* and *Foucha*, the state prohibited the patients from leaving custody. *Foucha*, 504 U.S. at 79 ("involuntary"); *Addington*, 441 U.S. at 420 ("involuntar[y]"). Detention during removal proceedings is not involuntary in that basic sense. The alien remains free to decline to seek continuances, relief from removal, or pursue other measures, and instead to accept a remov-

al order and thereby terminate the proceedings and resulting detention. See pp. 13-14, *supra*.[10]

Salerno also undermines a six-month rule. That case involved pretrial detention, 481 U.S. at 748, not detention of an alien pending removal proceedings. Indeed, *Salerno* cited *Carlson* and *Wong Wing* as establishing that that there is "no absolute constitutional barrier to detention of potentially dangerous resident aliens pending deportation proceedings." *Ibid.* And *Salerno* "intimate[d] no view as to the point at which detention in a particular case might become excessively prolong-ed, and therefore punitive, in relation to Congress' regulatory goal." *Id.* at 747 n.4.

3. The liberty interests of criminal aliens detained under Section 1226(c) are ordinarily substantially diminished

The criminal grounds on which an alien is subject to mandatory detention are also grounds on which the alien is removable from the United States. See 8 U.S.C. 1226(c)(1). Removability ordinarily will have been established, beyond dispute, by the alien's judgment of conviction. But an alien is entitled to a *Joseph* hearing to seek to establish that the government is substantially unlikely to prevail in demonstrating that his conviction is one that subjects him to mandatory detention. 8 C.F.R. 1003.19(h)(2)(ii).

Not surprisingly, many criminal aliens detained under Section 1226(c) concede they are removable, and subclass members were virtually always found removable. See J.A. 96 (only 20 of 409 such completed cases

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[10] Many criminal aliens detained under Section 1226(c) are ineligible for asylum and withholding. See 8 U.S.C. 1158(b)(2)(A), 1231(b)(3)(B).

were terminated). Thus, while such aliens often nonetheless seek *relief* from removal, in the vast majority of cases "he or she has no right under the basic immigration laws to remain in this country." *Zadvydas*, 533 U.S. at 720 (Kennedy, J., dissenting); see *Demore*, 538 U.S. at 523 n.6 (distinguishing between being "*deportable*" and seeking relief from removal that may mean the alien will not "*ultimately be deported*"). Moreover, such requests by class members were usually for discretionary relief, such as cancellation of removal. See Resps. Br. 20 n.5; J.A. 94, 97. Such a request is "manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace." *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956); see *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (akin to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict"). A criminal alien pursuing such discretionary relief notwithstanding that he is removable has greatly diminished due process interests in being released into society while that request is being considered.

The government's interest also becomes stronger (and a criminal alien's liberty interest weaker) when an IJ has ordered him removed. At that point, the government has devoted considerable resources to completing those proceedings; the IJ has concluded that the criminal alien is removable and ordered him removed; and further review will ordinarily leave that order intact. See p. 16, *supra*. If a criminal alien nonetheless makes the "difficult judgment[]" to appeal to the BIA, he does so knowing that it will extend his removal proceedings and resulting mandatory detention. *Demore*, 538 U.S. at 530 n.14 (citation omitted).

The imbalance becomes even greater if the BIA orders removal. And if the alien files a petition for review in a court of appeals, he need not abandon his claims to be released from immigration detention. Rather than seeking a stay of removal, he can depart or be removed and litigate from abroad. See pp. 13-14, *supra*. A criminal alien thus has a particularly weak interest in being released into the United States while seeking BIA review of an IJ removal order; weaker still when he files a petition for review and obtains a stay of removal, rather than litigating from abroad; and weaker further still when, at any stage, he does not dispute (or cannot reasonably dispute) that he is removable and thus lacks any substantive right to remain.

4. The pace of removal proceedings cannot be measured by a one-size-fits-all time limit

"[T]he complex course of events during removal proceedings" makes a fixed six-month yardstick particularly untenable. *Sopo* v. *U.S. Att'y Gen.*, 825 F.3d 1199, 1216 (11th Cir. 2016); see *Ly* v. *Hansen*, 351 F.3d 263, 272-273 (6th Cir. 2003) (discussing the "inevitable elasticity" of removal proceedings). "[R]emoval proceedings involve many * * * exigencies and the conduct of the criminal alien can equally affect the duration of that alien's removal proceedings." *Sopo*, 825 F.3d at 1216. Some criminal aliens may concede they are removable, pursue no relief, and be removed very swiftly. Others may concede that they are removable but ask the Attorney General or Secretary for relief from removal. "Some ask for multiple continuances"; "some choose to file frivolous appeals"; others file reasonable appeals; most do not appeal at all; "and each IJ has a docket with different demands." *Ibid.*

This Court's precedents under the Speedy Trial Clause in the criminal context illustrate how the Constitution cannot be read to superimpose a rigid deadline on the flexible and multi-layered adjudicatory system here. The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. Amend. VI. In interpreting that express constitutional guarantee, this Court has unanimously rejected a rule "that the government must be ready for trial *within six months of the date of arrest*, except in unusual circumstances." *Barker* v. *Wingo*, 407 U.S. 514, 523 (1972) (emphasis added).[11] "We cannot definitely say how long is too long," the Court stated, "in a system where justice is supposed to be swift but deliberate." *Id.* at 521; see *id.* at 538 (White, J., concurring) ("[C]ases will differ among themselves as to the allowable time between charge and trial.").

The Court in *Barker* found "no constitutional basis for holding" that the right "can be quantified into a specified number of days or months." 407 U.S. at 523. Adopting such a rule, the Court concluded, "would require this Court to engage in legislative or rulemaking activity," "rather than in the adjudicative process." *Ibid.* The "inflexible" approach of a "fixed-time period," the Court reasoned, thus "goes further than the Constitution requires." *Id.* at 529. Instead, the Court held that "any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case." *Id.* at 522.

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[11] The six-month rule had been adopted by the Second Circuit and was recommended by the American Bar Association. *Barker*, 407 U.S. at 523.

Under *Barker*, the Court has found that the Speedy Trial Clause was not violated in cases involving pretrial detention longer than six months. For example, the defendant in *Barker* itself had been in pretrial detention for "10 months." 407 U.S. at 517. And in *Vermont* v. *Brillon*, 556 U.S. 81 (2009), the defendant had been in pretrial detention for "[n]early three years." *Id.* at 84. The Court found no "show[ing] that [the defendant] was denied his constitutional right to a speedy trial" where extensive delays were attributable to him. *Id.* at 94.

Congress has also adopted a flexible, not rigid, standard in the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.* As a starting point in the statutory calculation, a trial must commence within 70 or 90 days of the indictment, information, or defendant's first appearance. 18 U.S.C. 3161(c)(1), 3164(b). But the Act excludes time that elapses because of continuances found to be in the interests of justice, pretrial motions, and many other events, including when the government (not the defendant) is the movant. See 18 U.S.C. 3161(h). Those events thus expand the metric of what is "speedy" when doing so is justified by the circumstances of an individual case.

The lower courts have similarly adopted a flexible, not rigid, approach when deciding as-applied due process challenges to extended pretrial detention. Courts make such judgments "on the facts of individual cases," including the duration of detention, the evidence of dangerousness, the complexity of the case, and the respective responsibility of the government (or the defendant) for the time that has elapsed. *United States* v. *Zannino*, 798 F.2d 544, 547 (1st Cir. 1986) (per curiam); see *United States* v. *Gonzales Claudio*, 806 F.2d 334, 340-342 (2d Cir. 1986); *United States* v. *Hare*, 873

F.2d 796, 800-801 (5th Cir. 1989); *United States* v. *Gelfuso*, 838 F.2d 358, 359 (9th Cir. 1988). Under that approach, "the length of a detention period will rarely by itself offend due process." *United States* v. *Orena*, 986 F.2d 628, 631 (2d Cir. 1993).

Applying that case-specific approach, courts of appeals have repeatedly upheld pretrial detention lasting more than six months. *E.g.*, *United States* v. *El-Hage*, 213 F.3d 74, 76-81 (2d Cir.) (per curiam) (30-33 months), cert. denied, 531 U.S. 881 (2000); *United States* v. *Quartermaine*, 913 F.2d 910, 918 (11th Cir. 1990) (8-10 months); *Zannino*, 798 F.2d at 548-549 (16 months); *United States* v. *Landron-Class*, 705 F. Supp. 2d 154, 159 (D.P.R. 2010) (collecting circuit cases upholding 24, 32, and 40 months of pretrial detention); but see *United States* v. *Theron*, 782 F.2d 1510, 1516-1517 (10th Cir. 1986) (finding violation at four months). Indeed, a district court recently observed that, when "the length of the defendant's detention is relatively short, between six months and a year," some courts conclude "that due process challenges are premature" without a need to fully weigh the factors. *United States* v. *Omar*, 157 F. Supp. 3d 707, 716 (M.D. Tenn. 2016) (citation omitted); see *United States* v. *Tortora*, 922 F.2d 880, 889 (1st Cir. 1990) (finding claim "presently unripe" after "more than half a year" of pretrial detention). And even if a court finds that pretrial detention has become unconstitutionally prolonged, the remedy may not be a bond hearing or release in a particular case. Instead, it may be an order that a trial begin within a specified period. *E.g.*, *Theron*, 782 F.2d at 1516-1517. So too here. If a criminal alien believes that his removal proceedings and detention have become impermissibly prolonged, the more tailored rem-

edy is to advance those proceedings to a prompt conclusion (not to grant a bond hearing with the possibility of release).

As all of these authorities demonstrate, the Constitution furnishes no basis for imposing a one-size-fits-all six-month rule.

5. Class members' litigation choices necessitated much of the time that elapsed in removal proceedings and resulting detention

The record contains extensive evidence that, for the class as a whole, aliens' litigation choices considerably extended their proceedings.[12] First, extended periods elapsed for class members because they sought continuances, which are granted "for good cause shown." 8 C.F.R. 1003.29. Nearly all (86.9%) in-period class members requested a continuance; "over half" requested three or more; alien-requested continuances within the first six months of detention alone were typically responsible for more than half of that period (median 101 days) for aliens who sought one; and in 18.6% of cases, alien-sought delay in the first six months was 151 days or more. J.A. 136-137, 152-153. Aliens often have good reasons for seeking continuances and thus extending their proceedings, but that simply illustrates that there is a correspondingly good reason to extend the length of the detention during those proceedings. Otherwise, detention would not serve its purposes of preventing flight and recidivism by criminal aliens during those proceedings.

Second, requesting relief from removal necessarily extends the adjudication of removal proceedings (and

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[12] The Section 1226(c) subclass has comprised nearly half the class. J.A. 71, 92 (460 of 1000 studied class members).

incident detention under Section 1226(c)). For example, the median duration of detention for in-period class members who sought relief from removal (303 days) was 50 days longer than for those who did not (253 days). J.A. 195.

It also necessarily takes time to decide appeals: It requires briefing, may require oral argument, and the BIA must decide the case. An appeal to the BIA added 94 days to the median detention of in-period class members, and Ninth Circuit review added another 219 days—adding more than 10 months (313 days) total for both layers of review. J.A. 191. Moreover, the median for in-period class members who sought relief *and* two layers of appellate review (582 days) was nearly a year longer than the median for those who did none of the above (236 days). J.A. 197.

Notably, although seeking continuances, relief from removal, and appellate review necessarily extends the time needed to adjudicate a case, class members who made those choices usually did not prevail. Virtually all studied Section 1226(c) subclass members with completed cases were found removable. See pp. 35-36, *supra*. The alien was denied any kind of relief in 63% (259 of 409) of such cases. J.A. 96. And class members who sought BIA and/or Ninth Circuit review lost about 95% of the time. See p. 16, *supra*.

6. A constitutional mandate of bond hearings at six months would create a perverse incentive for criminal aliens to prolong proceedings

"[C]ourt ordered release cannot help but encourage dilatory and obstructive tactics by aliens." *Demore*, 538 U.S. at 530 n.14 (brackets in original) (quoting *Zadvydas*, 533 U.S. at 713 (Kennedy, J., dissenting)); *ibid.* (discussing evidence of aliens released on bond filing

frivolous appeals to delay their removal). Most circuits to address the issue have rejected a requirement of bond hearings at the six-month mark, as a matter of statutory interpretation, in part because of this concern. See *Sopo*, 825 F.3d at 1216 ("[A] criminal alien could deliberately cause months of delays in the removal proceedings to obtain a bond hearing and then abscond and avoid removal altogether."); *Reid*, 819 F.3d at 501 (differentiating delays due to dilatory tactics); *Chavez-Alvarez* v. *Warden York Cnty. Prison*, 783 F.3d 469, 476 (3d Cir. 2015) ("[A]liens who are merely gaming the system to delay their removal should not be rewarded with a bond hearing that they would not otherwise get."); *Ly*, 351 F.3d at 272 (cautioning against rewarding aliens who "raise frivolous objections and string out the proceedings").

Indeed, mandating bond hearings after six months would create a powerful incentive for criminal aliens to prolong proceedings—and they have considerable ability to do so—because they otherwise cannot be released during removal proceedings and are highly likely to be ordered removed at the end. Respondents have emphasized that about 70% of class members have been granted bond after a *Rodriguez* hearing, and about 70% of those posted bond and were released. Resps. Br. 11; see J.A. 528-529. That suggests that an alien's chances of being granted bond under the injunction here (about two-thirds) and released (about half) were considerably higher than their chances of obtaining relief from removal (about a third), pp. 16, 42, *supra*, and far higher than their chances of winning a termination (about 5%), *id.* at 16, 35-36. Under a six-month rule, many criminal aliens would have a better prospect for avoiding removal not by litigating to comple-

tion, but by prolonging proceedings, obtaining bond, and absconding.

7. Requiring bond hearings for criminal aliens at six months would cause serious problems of flight and recidivism

If bond hearings were required at the six-month mark, a significant portion of criminal aliens who Congress concluded should *never* be released during removal proceedings nonetheless would be released after a bond hearing, giving them opportunities to flee or reoffend in the meantime. This Court in *Demore* found "striking" studies showing that, "[o]nce released, more than 20% of deportable criminal aliens failed to appear for their removal hearings," and another study finding that 23% of such aliens failed to appear. 538 U.S. at 519-520. The record in this case provides no basis for questioning that serious concern, or for concluding that criminal aliens released on bond after six months of removal proceedings are materially more likely to appear than those released on bond at the beginning.

EOIR has published statistics suggesting that flight remains a serious problem in the system as a whole, even with individualized screening. EOIR has reported that, in each fiscal year from 2011 through 2015, between 28% and 41% of initial completions involving aliens released on bond were *in absentia*. EOIR, *FY 2015 Statistics Yearbook*, P3 (Apr. 2016) (*2015 Yearbook*). Respondents rely (Br. 41 & n.15) on a website to suggest that the figure should be 14%. But that figure includes thousands of cases that were administratively closed through the exercise of prosecutorial discretion, and thus there was nothing to flee. See *2015 Yearbook* C5 ("other completions"). In any event, a 14% flight rate would still be a serious problem: that

would show that detained aliens were about three times as likely to flee if released on bond (14%) as class members were to have a substantive right to live inside the United States (5%). See p. 16, *supra*.

Evidence before Congress when it enacted Section 1226(c) also demonstrated that recidivism by released criminal aliens was a serious problem, notwithstanding individualized screening. See *Demore*, 538 U.S. at 518; *Zadvydas*, 533 U.S. at 713-714 (Kennedy, J., dissenting). Again, the record in this case provides no basis for questioning the seriousness of that problem, or for concluding that individualized screening at the six-month mark (rather than at the beginning) would solve it. Indeed, the then-Director of ICE recently testified before Congress that a significant portion of class members who were released on bond from October 2012 through December 2013 under the preliminary injunction in this case have been re-arrested by other law enforcement agencies, notwithstanding individualized bond hearings. Dep't of Homeland Sec., *Written Testimony of ICE Director Sarah Saldaña, for a House Committee on the Judiciary Hearing Titled "Oversight of U.S. Immigration and Customs Enforcement"* (Sept. 22, 2016).[13]

B. As-Applied Challenges Are An Adequate And Appropriate Remedy In Extraordinary Cases

For the reasons set forth above, the Constitution itself provides no basis for requiring bond hearings

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[13] That particular cohort likely consisted predominately of criminal aliens detained under Section 1226(c) because the preliminary injunction did not cover aliens detained under Section 1226(a), Pet. App. 148a, and the Section 1225(b) subclass appears relatively small, J.A. 90-91.

whenever removal proceedings and incident detention of a criminal alien under Section 1226(c) last six months. Rather, in an extraordinary case, the appropriate safety valve is an as-applied constitutional challenge in an individual habeas action that can take into account the reasons why that outlier case is an outlier in the first place. See Gov't Merits Reply Br. 19-21; Gov't Br. 46-50.

The Second and Ninth Circuits required bond hearings at the six-month mark, as a matter of statutory construction, in part because of concern that case-by-case adjudication could lead to different outcomes in similar cases and that there could be a large number of cases. See *Lora* v. *Shanahan*, 804 F.3d 601, 615-616 (2d Cir. 2015), petition for cert. pending, No. 15-1205 (filed Mar. 25, 2016), and cert. denied, 136 S. Ct. 2494 (2016). Most circuits to consider such a rule, however, have instead adopted a flexible "reasonableness" test as a matter of statutory interpretation. *E.g.*, *Sopo*, 825 F.3d at 1215-1217; *Reid*, 819 F.3d at 495-498. No court has held that the Due Process Clause itself imposes a one-size-fits-all rule of bond hearings after six months.

Under the six-month rule, many criminal aliens would obtain a bond hearing—and many of those would be granted bond and released—notwithstanding that their detention pending removal proceedings is constitutional. If courts instead evaluate individual cases in the context of as-applied challenges, the number of viable cases should be small. Rather than dragging its feet, the government expedites detained cases to ensure that they end with reasonable dispatch. See pp. 14-16, *supra*. And if there is delay, an alien can ask the IJ, BIA, or court of appeals to move faster. See *Barker*, 407 U.S. at 530-531.

"[F]ederal courts have the institutional competence to make fact-specific determinations," *Sopo*, 825 F.3d at 1217, as demonstrated by their ability to apply case-specific standards under the Speedy Trial Clause and as-applied challenges to prolonged pretrial detention, see pp. 37-41, *supra*. Respondents have provided no basis for concluding that, in exceptional cases, an as-applied constitutional challenge in an individual habeas action would be unworkable here. Cf. *Flores*, 507 U.S. at 314 (observing that there was "no evidence * * * that habeas corpus [wa]s insufficient to remedy particular abuses" in terms of detention for "undue periods"). In any event, concerns about workability would call for "legislative or administrative intervention, not judicial decree." *Sopo*, 825 F.3d at 1217 (quoting *Reid*, 819 F.3d at 498). A bright-line time limit would "go[] further than the Constitution requires." *Barker*, 407 U.S. at 529.

IV. The Constitution Does Not Require The Government To Conduct Bond Hearings Automatically Every Six Months, To Bear The Burden Of Proof (Much Less By Clear-And-Convincing Evidence), Or To Change The Bond Factors

A. Automatic Hearings Are Not Required

As set forth above, the Constitution does not require the government to provide bond hearings at the six-month mark for aliens in removal proceedings and incident detention under Section 1225(b) or Section 1226(c). It follows *a fortiori* that the Constitution does not require the government to conduct bond hearings automatically, every six months, for every alien in removal proceedings and incident detention under Section 1226(a). Federal regulations have long provided that aliens detained under Section 1226(a) are auto-

matically assessed for bond eligibility at the outset and, if denied bond by the Department of Homeland Security, informed of their opportunity to ask an IJ for a redetermination. 8 C.F.R. 236.1(d)(1), 1236.1(d)(1); see J.A. 43 (notice given to detained aliens). An alien can appeal an IJ's bond ruling to the BIA. 8 C.F.R. 236.1(d)(3). And if the alien is denied bond or fails to post bond, he can later obtain another hearing by showing that "circumstances have changed materially." 8 C.F.R. 1003.19(e). The Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.*, similarly allows for an additional bond hearing if "information exists that was not known to the movant at the time of the hearing and that has a material bearing on" the defendant's bail risk. 18 U.S.C. 3142(f). That is ample process.

The Due Process Clause does not require the government to provide redundant hearings automatically, that nobody has asked for, and where circumstances have not materially changed since the last one. See *Goldberg* v. *Kelly*, 397 U.S. 254, 267 n.14 (1970) ("Due process does not, of course, require two hearings."). Congress "emphatic[ally]" intended the government's discretionary decisions regarding detention under Section 1226(a) to be "presumptively correct and unassailable except for abuse." *Carlson*, 342 U.S. at 540. More broadly, "due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews* v. *Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972)). Under either standard, the existing procedures are fully sufficient. The risk of an erroneous deprivation and probable value of an additional hearing are near zero when a prior hearing has already occurred, nobody asked for a new one, or the alien asked but nothing has

materially changed. Conversely, the government's interest in avoiding unnecessary burdens looms large. Every minute an IJ spends conducting a redundant bond hearing is a minute that the IJ would have better spent adjudicating a removal case.

B. The Government Need Not Bear The Burden Of Proof, Much Less By Clear-And-Convincing Evidence

1. The Constitution does not require the government to bear the burden of establishing that the alien will be a flight risk or danger—much less by clear-and-convincing evidence—to justify temporary detention pending removal proceedings. In the entire history of federal immigration law, this Court has *always* affirmed the constitutionality of detention pending removal proceedings notwithstanding that the government has *never* borne the burden to justify that detention by clear-and-convincing evidence. *E.g.*, *Demore*, 538 U.S. at 531; *Flores*, 507 U.S. at 306; *Carlson*, 342 U.S. at 538; see *Zadvydas*, 533 U.S. at 701. Indeed, this Court has upheld detention pending removal proceedings on the basis of a categorical, rather than individualized, assessment that a valid immigration purpose warranted interim custody. *Demore*, 538 U.S. at 523-527 (discussing *Flores* and *Carlson*). Moreover, longstanding regulations place the burden on the alien in bond hearings under Section 1226(a), 8 C.F.R. 236.1(c)(8), and even respondents have never contended that those regulations are unconstitutional as applied in an initial bond hearing.

Furthermore, *Demore* upheld mandatory detention under Section 1226(c), which expressly puts the burden on the alien in the only situation in which release is permitted. Section 1226(c) altogether prohibits release of the specified criminal or terrorist aliens, ex-

cept that the alien may be released if it is "necessary" for witness protection and "the alien satisfies the Attorney General" that he "will *not* pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." 8 U.S.C. 1226(c)(2) (emphasis added). Counsel for the alien in *Demore* told this Court that there would be "no problem" with placing the burden on the criminal alien. *Demore* Oral Arg. Tr. 48. By that time, the alien in *Demore* had already been in removal proceedings for more than six months and they would take longer still to complete. 538 U.S. at 531. And in *Zadvydas*, this Court placed the burden on the alien who is subject to potentially indefinite detention following entry of a final order of removal to show "that there is no significant likelihood of removal in the reasonably foreseeable future." 533 U.S. at 701.

The court of appeals relied on *Addington* to hold that the government must bear the burden by clear-and-convincing evidence at the six-month mark. Pet. App. 53a. But as explained above, *Addington* is inapposite and certainly does not support a novel rule shifting the burden to the government at the six-month mark. Unlike involuntary commitment of a mentally ill resident, the government has plenary authority over immigration and the exclusion or expulsion of aliens. See *Flores*, 507 U.S. at 305 ("Over no conceivable subject is the legislative power of Congress more complete.") (brackets and citations omitted). Unlike the free-standing regime of civil commitment in *Addington*, detention here is a vital incident of removal proceedings in which the alien enjoys significant protections and the opportunity to apply for relief from removal. Unlike the involuntary commitment in *Adding-*

ton, an alien may voluntarily end removal proceedings and the immigration detention incident to them. See pp. 13-14, *supra*. Unlike civil commitment, which is potentially permanent, "*detention pending a determination of removability*" is inherently temporary. *Demore*, 538 U.S. at 529 (quoting *Zadvydas*, 533 U.S. at 697). *Addington* thus provides no basis for a constitutional mandate shifting the burden to the government and requiring clear-and-convincing evidence to justify temporary detention in the interim.

2. An inflexible constitutional mandate that the government must bear the burden in every bond hearing—particularly by clear-and-convincing evidence—would seriously damage the immigration system.

For a century, Congress's consistent judgment has been that an alien at the threshold of initial entry must be placed in removal proceedings and detained in the meantime unless he is "clearly and beyond a doubt entitled to be admitted," 8 U.S.C. 1225(b)(2)(A), or is paroled into the United States by the Secretary, 8 U.S.C. 1182(d)(5). Holding that the Constitution itself both requires the government to conduct a bond hearing for such aliens, *and* requires the government to bear the burden of proof to justify interim exclusion, would invert that consistent judgment of caution. It would embody a judgment that the Constitution commands that the Nation assume the risks of allowing release into the United States of aliens arriving at our borders for the first time, even before a final determination of their admissibility is made. It would also reward the party with the best access to information regarding flight risk and danger—the alien—for not sharing it, allowing an inadmissible alien to physically enter the United States due to the government's lack

of information showing that he is *not* a flight risk or danger. Cf. *Rossi* v. *United States*, 289 U.S. 89, 91-92 (1933) (allocating burden in part due to information asymmetry); *United States* v. *Denver & Rio Grande R.R.*, 191 U.S. 84, 92 (1903) (same). The result would be an increased risk that aliens who otherwise would be excluded instead would be allowed into the United States in the interim and thereafter abscond or cause harms that the immigration laws are designed to prevent. Requiring *clear-and-convincing evidence* to warrant interim exclusion would make the problem even worse. And because it would be a constitutional rule, Congress would have limited authority to respond.

Holding that the Constitution requires the government to conduct bond hearings and bear the burden with respect to criminal aliens detained under Section 1226(c) would similarly cause many of the harms of flight and recidivism that Congress enacted that provision to prevent. Congress enacted Section 1226(c) because IJs could not predict *ex ante* which released criminal aliens would reoffend or flee, and experience showed that they did so "in large numbers." *Demore*, 538 U.S. at 513. Shifting the burden to the government would not only largely restore the *status quo ante*, as IJs would again need to predict flight risk and recidivism —the very undertaking Congress declined to entrust to them—but also would exacerbate the problem. Before Congress enacted Section 1226(c), an LPR convicted of an aggravated felony already bore the burden in bond hearings, and all other aliens with such convictions were categorically prohibited from being released on bond. See 8 U.S.C. 1252(a)(2)(A) and (B) (1994). Shifting the burden to the government *and* requiring clear-and-convincing evidence would make that

prediction problem even worse, ensuring that IJs would release an even larger proportion of criminal aliens who would then flee or reoffend.

Holding that the Constitution requires the government to bear the burden of proof in six-month bond hearings under Section 1226(a) would similarly cause practical problems that Congress has sought to address. Initially, the 1917 Act provided that, when an alien is taken into custody for removal proceedings, "he may be released under a bond." § 20, 39 Stat. 891. A circuit conflict developed, with some courts holding that the phrase "he may be released" meant that the alien had a presumptive right to be released, and others holding that the decision rested with the government's discretion. See *Carlson*, 342 U.S. at 538-540. Congress responded by "enacting the precursor" to Section 1226(a), which "eliminated any presumption of release pending deportation" and instead expressly "committ[ed] that determination to the discretion of the Attorney General." *Flores*, 507 U.S. at 306 (citing *Carlson*, 342 U.S. at 538-540).

In exercising that discretion, the government previously applied a presumption that non-criminal aliens detained under Section 1226(a) would be released on bond, unless the government could show by a preponderance of the evidence that he was a flight risk or danger. See 62 Fed. Reg. 10,323 (Mar. 6, 1997). Over time, however, the INS was "strongly criticized for its failure to remove aliens who are not detained." *Ibid.* Accordingly, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, Congress provided "budget enhancements and other legislation," including for increased bed space to hold aliens, to "increase[]

detention to ensure removal." 62 Fed. Reg. at 10,323. The INS responded by amending its regulations to place the burden on the alien, which it concluded was "consistent with the intent of Congress" in enacting IIRIRA. *Ibid.* Shifting the burden back to the government, by contrast, would impede removal efforts and lead to more "failure[s] to remove aliens who are not detained." *Ibid.* Requiring clear-and-convincing evidence would magnify that problem, and constitutionalizing the burden would make it permanent.

C. The Length Of Detention Is Not A Relevant Bond Factor

Finally, even if (contrary to our submissions above) the Due Process Clause did require a bond hearing under Section 1225(b) or 1226(c), or an automatic additional hearing under Section 1226(a), the length of an alien's detention would not be a relevant consideration in determining whether bond was warranted. In the context of removal proceedings, the purpose of a bond hearing is to ensure on an individualized basis that the alien does not pose a flight risk or a danger to society in the interim. As discussed at length above, however, the passage of time does not diminish those risks and, indeed, in many cases increases them. The Due Process Clause, therefore, does not require the government also to put a substantive thumb on the scale in favor of releasing the alien into the United States.

The court of appeals' only justification for forcing IJs to consider duration was that "longer detention requires more robust procedural protections." Pet. App. 56a. But under the court's (erroneous) ruling, the passage of time would already trigger the "more robust procedural protections" of the bond hearing itself that Section 1226(c) or 1225(b) would otherwise not permit

(or that would not be automatically provided under Section 1226(a)). That approach would also exacerbate the incentive to delay, because delaying would both trigger a bond hearing and further increase the likelihood of release.

In the criminal context, bail determinations are made on the basis of flight risk or danger, not the duration of detention. 18 U.S.C. 3142(f)(2), 3143(b)(1)(A). Moreover, when removal proceedings have taken six months for detained aliens, they usually have been relatively close to being complete—and in the end, the aliens usually have lost. See pp. 16-17, *supra*. Making duration a factor thus would increase flight risk at a time when the government's interest in preventing flight is particularly strong.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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ECORD
AND
RIEFS

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IN THE

Supreme Court of the United States

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DAVID JENNINGS, *et al.*,

Petitioners,

v.

ALEJANDRO RODRIGUEZ, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1) Whether the Constitution requires that aliens seeking admission to the United States who are subject to mandatory detention under 8 U.S.C. 1225(b) must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months.

2) Whether the Constitution requires that criminal or terrorist aliens who are subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months.

3) Whether the Constitution requires that, in bond hearings for aliens detained for six months under Sections 1225(b), 1226(c), or 1226(a), the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community, whether the length of the alien's detention must be weighed in favor of release, and whether new bond hearings must be afforded automatically every six months.

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INTRODUCTION

The supplemental briefing order asks the parties to address whether the Constitution requires the relief ordered below. It does.

Freedom from physical incarceration lies at the heart of the liberty that the Due Process Clause protects. Every Class member has been incarcerated for at least six months without any individualized hearing where the Government has shown that further detention is needed. Absent the relief ordered below, most would likely remain in detention for a year or more without such a hearing. Respondent Alejandro Rodriguez's detention, for example, lasted over three years without a hearing and, without this litigation, would have continued for four more before he won his removal case. The Constitution does not permit incarceration of this length absent individualized custody hearings to ensure that detention serves a valid purpose and remains reasonable in relation to that purpose.

In the immigration context, detention becomes prolonged after six months. This Court has looked to that time period as significant in various contexts involving both civil and criminal confinement. National security cases aside, the Court has never permitted civil detention of longer than six months without an individualized custody hearing.

Class members do not maintain that they must be *released* after six months, only that the Government cannot detain them for prolonged periods without a *hearing* to determine whether continued detention is justified, or whether instead release under conditions of supervision is appropriate in light of flight risk or danger.

Of the three Subclasses at issue, two would be denied individualized custody hearings altogether absent the injunction. Arriving noncitizens held under color of 8 U.S.C. 1225(b) ("Arriving Subclass") were denied any opportunity for release before a neutral decision maker. The only officials who considered whether to release them prior to the injunction were the jailing authorities themselves, who conduct no hearing.

Those with certain convictions subject to mandatory detention under color of 8 U.S.C. 1226(c) ("Mandatory Subclass") were denied the opportunity for release altogether. In Petitioners' view, the law requires their incarceration, even for years, for however long their cases take to conclude.

The Government does provide custody hearings to the third subclass—those detained pursuant to 8 U.S.C. 1226(a)—but without the procedural safeguards ordered below to ensure that the hearings are meaningful. In all other contexts involving prolonged civil detention, due process requires the Government to bear the burden of proof by clear and convincing evidence. The conditions of prolonged incarceration, as well as most detainees' lack of counsel and English proficiency, make it fundamentally unfair to place the burden on them.

The relief ordered below also has proven workable. Hundreds of Class members have been ordered released under supervision because they presented no flight risk or danger, while in hundreds of other cases the Government has met its burden to justify continued prolonged detention.

BACKGROUND

The facts are set forth in detail in Respondents' brief, and therefore only summarized here. Resp. 5-11.[1] All Class members are in ongoing immigration proceedings and, accordingly, the Government has no present legal authority to deport them. Many will win their cases and never be ordered removed. If the Government prevails in a removal case, the individual is no longer a Class member. The Class excludes individuals detained under national security detention statutes. App. 5a-6a.

Prior to the injunction, all Class members were incarcerated for at least six months without a hearing where the Government demonstrated flight risk or danger to the community, the only valid justifications for continued detention in this context.

1. The Class is composed of three Subclasses. The "Arriving Subclass" consists of persons detained for more than six months who presented themselves at a port of entry and were screened in for a full removal proceeding under color of 8 U.S.C. 1225(b)(1)(B)(ii) or 1225(b)(2)(A). App. 108a.

a. Most Arriving Subclass members seek asylum. Upon presenting themselves at the border, they were interviewed by an asylum officer, who determined each had a "credible fear" of persecution in their home countries and, therefore, has a "significant possibility" of establishing eligibility for asylum. 8 U.S.C. 1225(b)(1)(B)(ii), (v). They have been referred for removal proceedings before an Immigration Judge (IJ) under 8 U.S.C. 1229a. 8 C.F.R. 208.30(f).

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[1] This brief refers to Petitioners' opening brief as "Br.", Respondents' prior brief as "Resp.", and Petitioners' reply brief as "Reply".

b. A minority of Arriving Subclass members are lawful permanent residents (LPRs) or others who presented facially valid entry documents at the border, but have been referred for removal proceedings because an immigration officer believed they were "not clearly and without a doubt entitled to be admitted." 8 U.S.C. 1225(b)(2)(A). They are detained pending removal proceedings before IJs.

c. By definition, none of the Arriving Subclass members remain subject to the summary removal procedures applicable to most individuals at the border, *see generally* 8 U.S.C. 1225(b), and none have been "denied entry." *Cf. Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953). The Government lacks legal authority to deport any of them, as their cases remain pending.

About two thirds of Arriving Subclass members won their cases, usually by obtaining asylum, even prior to the injunction (when all were detained). J.A. 98, tbl.28; J.A. 135, tbl.38; App. 40a.[2]

d. Prior to the injunction, all Arriving Subclass members were denied bond hearings before IJs. They received consideration for release only through the parole process—a cursory review conducted by field-level Department of Homeland Security (DHS) detention officers that includes no hearing, record, or

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[2] Petitioners claim that the Subclass includes people who were denied entry because it includes everyone detained under "Section 1225(b)," Reply 4 n.1. That is incorrect. While the parties and court used that terminology as shorthand, the Ninth Circuit's order reversing the denial of class certification specified the statutes at issue for each Subclass, App. 108a, and the only subsections of Section 1225(b) it mentioned are 1225(b)(1)(B)(ii) and 1225(b)(2)(A). The record concerning approximately 1,000 Class members contains no evidence of anyone detained under any other subsection of Section 1225(b).

appeal. Resp. 4. The Government has recently issued an Executive Order suggesting that releases through the parole process will decrease significantly. Border Security and Immigration Enforcement Improvements, Exec. Order, § 11(d) (Jan. 25, 2017), https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements.

In contrast to its treatment of Arriving Subclass members, all of whom presented themselves at the border, the Government provides individualized bond hearings to the far larger number of people who crossed the border without inspection and subsequently pass a credible fear interview. *See Matter of X-K-*, 23 I&N Dec. 731, 734 (BIA 2005); Br. of Social Science Researchers and Professors 8-9 (citing government statistics).

2. The "Mandatory Subclass" consists of individuals detained for more than six months under color of Section 1226(c). They do not challenge their initial mandatory detention, only their prolonged detention without a custody hearing. All Mandatory Subclass members have been detained for at least six months, and many for far longer. J.A. 92, tbl.20 (average of 427 days).

a. Individuals become subject to mandatory detention if an Immigration and Customs Enforcement (ICE) officer believes that they have been convicted of one of a broad range of criminal offenses—including certain misdemeanors and other minor crimes like simple drug possession. Under Petitioners' reading of the statute, IJs have no authority to consider them for release on bond based on flight risk and danger.

b. Mandatory Subclass members are detained longer than other people subject to mandatory detention because most have substantial defenses that take additional time to litigate—such as an argument that the charge of removal is invalid, or grounds for relief such as cancellation of removal. J.A. 77, tbl.7; 86, tbl.17; J.A. 121-22; App. 19a.

c. Nearly 40% of Mandatory Subclass Members won their cases even prior to the injunction (when all were detained). This was more than five times the success rate of the general detainee population. J.A. 95 & tbl.23; J.A. 135, tbl.38; App. 34a; J.A. 122, tbl.35. At least three quarters of them have a substantial defense to removal.

Among Class members with any criminal history, most of whom are in the Mandatory Subclass, more than half had no conviction with a sentence of more than six months, and many spent far longer in immigration detention than in criminal custody. J.A. 313-14; App. 34a.

3. The third subclass consists of individuals detained under Section 1226(a). Such individuals are apprehended in the interior of the United States and are not alleged to have a conviction that triggers mandatory detention.

These Subclass members do receive individualized custody hearings before an IJ. 8 C.F.R. 1236.1(d). Prior to the injunction, however, that hearing occurred only at the outset of their detention and the burden was on them to prove lack of flight risk or danger. Resp. 5. They could seek a new hearing only upon a showing that their circumstances had materially changed, but the passage of time—even of years—did not count as a changed circumstance (in the Government's view). J.A. 317; App. 46a-47a.

4. The injunction does not mandate anyone's release. It requires only a hearing to determine whether there is a factual basis for continued detention. Approximately half of those who have received hearings have remained in custody; the other half have been released on various conditions because an IJ concluded they did not pose a flight risk or danger that warranted detention. J.A. 526.

At the hearings, IJs consider whether the Government's immigration purposes can be served by imposing conditions of intensive supervision, including electronic ankle monitors with GPS tracking devices, rather than detention. App. 143a. Twenty thousand people each year are already supervised under the Intensive Supervision Assistance Program, J.A. 368, including many released under the injunction. This program has operated for over five years to ensure the appearance of between 94% and 100% of the thousands of people with removal cases who have been released under it, including "at or near 100%" in a region of Southern California where Class members reside, according to Petitioners' own witness. *See, e.g.*, J.A. 433, 565.

SUMMARY OF ARGUMENT

"Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty" that the Due Process Clause protects. *Zadvydas* v. *Davis*, 533 U.S. 678, 690 (2001); *see also id.* at 718 (Kennedy, J., dissenting) ("Liberty under the Due Process Clause includes protection against unlawful or arbitrary personal restraint or detention."). The Due Process Clause thus permits civil confinement only when it serves a valid governmental purpose. Where the

Government's purposes can be served without incarceration, due process forbids it.

It follows that due process also requires procedures to ensure that detention serves its purpose. An individualized hearing before "a neutral administrative official" as to the purpose of detention is a bedrock due process requirement for civil detention. *Id.* at 721-23 (Kennedy, J., dissenting). And where detention becomes *prolonged*, due process requires enhanced protections to ensure that it remains reasonable in relation to its purpose.

In the immigration context, this Court has recognized only two valid purposes for civil detention—to mitigate the risks of danger to the community and to prevent flight. *Id.* at 690; *Demore* v. *Kim*, 538 U.S. 510, 528 (2003). If the Government can protect these interests without detention, then detention does not serve a valid purpose and violates the Due Process Clause. While this Court upheld brief immigration detention without individualized custody hearings as to the narrow class of individuals at issue in *Demore*, when detentions are prolonged, due process requires individualized custody hearings to ensure that detainees present a sufficient flight risk or danger to justify their prolonged detention.

I.

Arriving Subclass members are entitled to this basic constitutional protection. Those who are returning LPRs (detained under color of 8 U.S.C. 1225(b)(2)(A)) have due process rights even as to their admission. *Landon* v. *Plasencia*, 459 U.S. 21, 34 (1982). It follows that these Subclass members also have the more basic due process right to be free from prolonged civil detention that is unnecessary, and

therefore the right to the procedural protection needed to vindicate that right.

Arriving Subclass members (detained under color of 8 U.S.C. 1225(b)(1)(B)(ii)) who have been found to have a "credible fear" of persecution, and have been referred for full hearings on their asylum applications, also have a constitutionally-protected interest in their physical liberty, for three reasons.

First, Respondents challenge the lack of procedures relating to their detention, not their admission. Petitioners defend prolonged detention without custody hearings as within the political branches' "plenary power," *see* Br. 14-15, 19-21, but the plenary power cases primarily concern "the power to expel or exclude" noncitizens, not the power to detain them. Br. 14. While the Government's power over admission and deportation may be "plenary," the power to subject people to prolonged incarceration is not. In any event, "[the plenary] power is subject to important constitutional limitations." *Zadvydas*, 533 U.S. at 695; *INS* v. *Chadha*, 462 U.S. 919, 941-42 (1983) (Congress must choose a "constitutionally permissible means of implementing [plenary] power"). Even if Arriving Subclass members have limited due process rights with respect to the procedures for admission, they still have a right to freedom from prolonged incarceration that is not needed to serve its purpose. *Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting) ("both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious").

Second, the Arriving Subclass members who seek asylum have passed a critical threshold in the admissions process: an asylum officer has determined that they have a credible fear of persecution, and has referred them for full adjudication of that claim in

removal proceedings. Because they have been *screened in*, these Arriving Subclass members have a right that Congress has afforded them to be here while their asylum claim is pending. They therefore stand in a distinct position from the vast majority of noncitizens stopped at the border, who are not screened in but instead summarily excluded.

Finally, because Arriving Subclass members, unlike the vast majority of arriving noncitizens, have been found to have a credible fear of persecution, they cannot voluntarily end their detention by returning to the countries from which they fled. Those who flee persecution do not "hold the keys to their cell" in any meaningful sense.

The Court need not decide whether any of these considerations, standing alone, would trigger due process safeguards against unjustified prolonged detention. When these factors coincide, the Due Process Clause prohibits prolonged detention without an individualized custody hearing.

II.

The Due Process Clause also protects Mandatory Subclass members (detained under color of 8 U.S.C. 1226(c)) from prolonged detention without justification. Supervision programs have now been shown, in thousands of cases, to be extraordinarily effective at ensuring compliance with the terms of release, according to Petitioners' own witness. The relief ordered below merely allows Class members a custody hearing where an IJ *considers* release from prolonged detention under such programs.

Petitioners' central argument against individualized custody hearings rests on an overbroad reading of *Demore* v. *Kim*, 538 U.S. 510

(2003). Petitioners contend that, under *Demore*, immigration detention always remains permissible, regardless of its length, where it occurs for the purpose of enforcing the immigration laws. Reply 13.

Demore cannot be read so broadly, both because the opinion itself contains important limitations and because the Government's reading would contravene bedrock due process principles that limit the permissible length of civil detention without a custody hearing. *Demore* upheld the *brief* mandatory detention of individuals with qualifying convictions who had *conceded their deportability*, making entry of a removal order virtually inevitable. 538 U.S. at 522 n.6, 528. Mandatory Subclass members, by contrast, face prolonged detention and have substantial defenses to removal. Nearly 40% of them prevailed on their challenges to removal even prior to the injunction, when they were all forced to litigate their cases while detained.

Reading *Demore* without regard to these limitations to broadly authorize all immigration detention without individualized hearings, so long as the Government is pursuing removal proceedings in good faith, would set a sweeping precedent at odds with this Court's due process cases. Petitioners' view would support mandatory detention far beyond what Congress authorized in Section 1226(c) and this Court upheld in *Demore*.

III.

Our nation's legal tradition has long recognized six months as a substantial period of physical confinement, such that significant process is required to continue incarceration beyond that time. In the late 18th century, a jury trial was generally required for any crime punishable for more than six months.

Duncan v. *Louisiana*, 391 U.S. 145, 161 & n.34 (1968). Today, a federal court may not impose a sentence of more than six months unless the defendant has the right to jury trial. *Cheff* v. *Schnackenberg*, 384 U.S. 373, 380 (1966) (plurality opinion). Six months has also been considered an outer limit for confinement without individualized inquiry in civil contexts, including immigration. *McNeil* v. *Dir., Patuxent Inst.*, 407 U.S. 245, 249, 250-52 (1972); *Zadvydas*, 533 U.S. at 701; *see* Resp. 38. Outside the national security context, this Court has never authorized civil detention beyond six months without an individual hearing.

This Court also has long recognized that certain constitutional guarantees cannot be consistently enforced absent administrable bright-line rules. The Fifth Amendment's protection of personal liberty from unreasonably prolonged incarceration is one such guarantee. The custody hearings ordered below are precisely the type of practical time limit that this Court has imposed for the protection of basic constitutional rights. *E.g.*, *Maryland* v. *Shatzer*, 559 U.S. 98, 110 (2010) (14 days); *Cty. of Riverside* v. *McLaughlin*, 500 U.S. 44, 55-56 (1991) (48 hours). This relief also was well within the lower courts' equitable discretion to remedy the extraordinary evidence of constitutional violations that pervades this record.

Thousands of Class members have been subjected to prolonged incarceration far beyond six months, with the average detention lasting over a year, and hundreds of individuals incarcerated for more than two years without a hearing. Such prolonged detention without review by a neutral decision maker far exceeds any length this Court has previously deemed consistent with due process norms. Hundreds

of Class members presented no flight risk or danger warranting continued detention; including victims of torture seeking asylum as well as longtime lawful residents convicted of relatively minor offenses, many of whom had U.S. citizen family members. Many of these detainees eventually won their cases. Nevertheless, prior to the injunction, they all remained in prolonged incarceration without any custody hearing to establish whether detention was in fact justified.

The record further confirms that the potential availability of habeas proceedings is insufficient to protect against widespread and unjustified prolonged detention. Habeas relief has long been theoretically available to all of these detainees; yet few can pursue it because detainees typically lack the requisite legal and linguistic resources. For those few who do pursue habeas relief, the lengthy time required to adjudicate their petitions means that most will remain subject to prolonged detention before a court ever resolves their petition. This evidence cannot be dismissed as mere "anecdote," Reply 15; it derives from a comprehensive study of one thousand Class members, and is confirmed by the findings of the circuit courts with a decade of experience considering prolonged immigration detention.

Petitioners' assertion that any custody hearing must take into account only whether the Government has engaged in unreasonable delay is misguided. The purpose of the hearing is to ensure that detention is actually needed to serve its purpose. Because the purposes of detention are to prevent danger and flight, those must be the focus of any hearing. While the question whether a detainee has engaged in dilatory tactics should be considered when assessing flight risk, a finding that DHS has engaged in

unreasonable delay cannot be a prerequisite for release, as Petitioners advocate.

IV.

The safeguards ordered by the district court—that the Government bear the burden by clear and convincing evidence, and that it conduct periodic hearings that consider the length of detention—are necessary to ensure meaningful protection against needless incarceration. They provide no more, and often far less, protection than do the safeguards provided to prolonged detainees in other contexts. Resp. 49-50, 55; *see also* Br. of Nat'l Ass'n of Criminal Defense Lawyers et al. 8-16.

Petitioners argue that the very limited procedural protections they advocate must suffice so long as they rest on a "facially legitimate and bona fide" justification. Br. 54 (citing *Fiallo ex rel. Rodriguez* v. *Bell*, 430 U.S. 787 (1977)). But that deferential standard derives from cases concerning the power of *admission*. This Court has never utilized it in any detention case, let alone one involving prolonged detention.

* * *

The regime of prolonged detention that Petitioners defend is far more draconian than any this Court has ever sanctioned outside the national security context. *Nowhere else in our legal system* is incarceration of this length permitted without the reasonable procedural protections ordered here. Resp. 17-19.

ARGUMENT

I. PROLONGED DETENTION UNDER SECTIONS 1225(b)(1)(B)(ii) AND 1225(b)(2)(A) WITHOUT AN INDIVIDUALIZED CUSTODY HEARING VIOLATES THE DUE PROCESS CLAUSE.

Due process requires individualized custody hearings to ensure that prolonged detention serves a valid purpose and remains reasonable in relation to it. *See infra* Point I.A.

This basic principle requires that Arriving Subclass members receive individualized custody hearings when detention exceeds six months. "[B]oth removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious," *Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting). That rule applies to Arriving Subclass members both because they have *not* been denied entry but rather were referred for full removal proceedings, and because the interest in physical liberty extends, at a minimum, to people detained in the United States where Congress has afforded them a right to remain until their asylum cases are resolved. *See infra* Point I.B.

The existing detention review procedure wholly fails to satisfy minimal due process requirements, as it provides no hearing before a neutral decision maker and routinely leads to the prolonged detention of individuals who pose no flight risk or danger, thus rendering detention unnecessary and, for that reason, arbitrary. *See infra* Point I.C.

A. Due Process Prohibits Prolonged Civil Detention Without Individualized Custody Hearings.

Due process does not permit prolonged civil confinement absent an individualized hearing before a neutral decision maker to ensure that detention is actually necessary to serve its purpose. All of this Court's civil detention cases (outside the national security context) have required such hearings. Resp. 18. The Court has required hearings for far lesser interests, including for criminals seeking release on parole (despite their having already been sentenced to the full term of their confinement), and even for property deprivations. *See, e.g.*, *Morrissey* v. *Brewer*, 408 U.S. 471 (1972); Resp. 27-28 (citing property cases).

This Court has often recognized the common-sense principle that prolonged deprivations of liberty require greater procedural protections than brief ones. For example, an individual can be detained on a police officer's finding of probable cause, but only for 48 hours. *McLaughlin*, 500 U.S. at 55-56. Further detention pending trial requires a "prompt" judicial hearing both to validate the police officer's probable cause finding and to determine whether the detainee presents too great a flight risk or danger to be released pretrial. *United States* v. *Salerno*, 481 U.S. 739, 747 (1987). Where trial proceedings become lengthy, still further process is required. *See* Resp. 57 (citing cases). *See also Hutto* v. *Finney*, 437 U.S. 678, 685-86 (1978) (holding in Eighth Amendment context that "it is equally plain ... that the length of confinement cannot be ignored in deciding whether [a] confinement meets constitutional standards").

The basic principle that due process requires more robust procedures when detention becomes prolonged

also runs throughout this Court's civil commitment doctrine. An individual found incompetent to stand trial may initially be held to attempt restoration, but only for a "reasonable period of time." *Jackson* v. *Indiana*, 406 U.S. 715, 733 (1972). Detention beyond the "initial commitment" requires additional safeguards, including individualized consideration of dangerousness. *Id.* at 736 (distinguishing *Greenwood* v. *United States*, 350 U.S. 366 (1956)). A state may commit a convicted prisoner to a mental institution "for observation limited in duration to a brief period" without additional procedures, but only because "lesser safeguards may be appropriate" for "short-term confinement." *McNeil*, 407 U.S. at 249-50. Similarly, "insanity acquittees may be *initially* held" on procedures less rigorous than those applicable to civil committees, but when detention becomes prolonged they must be afforded individualized hearings concerning flight risk or danger. *Foucha* v. *Louisiana*, 504 U.S. 71, 76 n.4 (1992) (emphasis added) (distinguishing *Jones* v. *United States*, 463 U.S. 354 (1983)).

This Court applied these principles to the immigration context in *Zadvydas*. 533 U.S. at 690-91. *Zadvydas* presumed the validity of detention for 90 days for individuals who had lost their cases and were awaiting removal, but required greater justification for those detained more than six months. *Id.* at 701. *See also Demore*, 538 U.S. at 529 (explaining this aspect of *Zadvydas*).

Petitioners contend that the due process principles articulated in *Zadvydas* do not apply here, both because in *Zadvydas* the immigration purpose had evaporated once no country would accept the detainees for repatriation, and because the detention at issue there was potentially permanent. Br. 37-38.

But *Zadvydas* did *not* limit its due process analysis to situations of "potentially permanent" detention. The Court relied on *Salerno*, which involves detention of finite length. 533 U.S. at 690. It rejected the Fifth Circuit's view that detention remains permissible so long as removal is not "impossible" and the Government acts in good faith. *Id.* at 702. The Court ruled instead that detention was authorized beyond six months only if removal was "significant[ly] likel[y] [to occur] in the reasonably foreseeable future." *Id.* at 701.

Zadvydas held that post-order detentions beyond six months require more scrutiny to ensure that they remain reasonable in relation to their purpose, not just that "potentially permanent" detentions are unauthorized. *See also* Br. 47 ("because longer detention [is] a greater imposition on an individual, as the passage of time increases a court may scrutinize the fit between means and the ends more closely") (citing *Zadvydas*, 533 U.S. at 701).

Thus, like other forms of civil detention, immigration detention that is unnecessary violates due process. If an individual does not present a flight risk or danger that warrants continued detention, the Constitution forbids it. And because *prolonged* detention requires more rigorous procedures to ensure that detention remains reasonable in relation to its purpose, when detention becomes prolonged due process requires the basic custody hearing authorized by the injunction.

B. The Due Process Prohibition On Prolonged Arbitrary Detention Applies To Arriving Subclass Members.

The Arriving Subclass—both the LPRs and the asylum seekers—are protected by these basic due process requirements. Resp. 27-32.

In *Landon* v. *Plasencia*, 459 U.S. at 34, the Court recognized that returning LPRs have due process rights even as to *admission*, where the political branches' power over immigration is greatest. Ms. Plasencia, a returning LPR, was arrested at the border after brief travel abroad. The Government conducted an exclusion hearing that lacked basic procedural protections, *id.* at 35-36, and argued that it need not provide additional process because she was seeking entry. *Id.* at 24. The Court, however, ruled that she "can invoke the Due Process Clause on returning to this country," *id.* at 32, and squarely rejected the Government's claim that "[w]hether different procedures should be adopted in the exclusion setting is for Congress, and not the courts, to decide." Br. For Petitioner 42, *Landon* v. *Plasencia*, No. 18-129, 1982 U.S. S. Ct. Briefs LEXIS 1223. In assessing Ms. Plasencia's rights, the Court applied traditional procedural due process doctrine, *see Plasencia*, 459 U.S. at 34 (citing, *inter alia*, *Mathews* v. *Eldridge*, 424 U.S. 319 (1976)).

Plasencia thus forecloses Petitioners' assertion that apprehension at the border by itself extinguishes the liberty interests of Arriving Subclass members. And its holding that returning LPRs have "weighty" liberty interests because they "stand[] to lose the right 'to stay and live and work in this land of freedom,'" *id.*, forecloses Petitioners' argument that returning LPR Subclass members have no right to

individualized custody hearings. Resp. 31-32.[3] Because returning LPRs have constitutional rights with respect to the procedures governing their *admission*, they also have constitutional rights with respect to their *physical liberty*, a right that "lies at the heart of the liberty" protected by the Due Process Clause. *Zadvydas*, 533 U.S. at 690.

The remaining Arriving Subclass members are asylum seekers found to have a "credible fear" of persecution, entitling them by law to protection against removal until, in a full removal hearing, an IJ has adjudicated their asylum claims. They too have due process rights against prolonged arbitrary detention.

First, these Subclass members seek procedures as to their detention rather than their admission. Procedural rights to ensure freedom from prolonged arbitrary detention arise from the Due Process Clause itself, not from a Congressionally-created right to admission. Thus, the Court need not address whether it remains the case that, in the admissions

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[3] *Plasencia*'s rejection of a formalistic test comports with cases adopting a functional approach even for those not in the United States. *See Boumediene* v. *Bush*, 553 U.S. 723, 764, 770 (2008) ("questions of extraterritoriality turn on objective factors and practical concerns, not formalism"); Law Professors Br. 16-18, 22-23. If the Constitution constrains the Government's power to detain foreign nationals as "enemy combatants" outside our borders in an armed conflict, surely it does so for Class members on U.S. soil. *See also Reid* v. *Covert*, 354 U.S. 1, 8 (1957) (plurality opinion) ("various constitutional limitations apply to the Government when it acts [abroad]").

While Petitioners note that the petitioner in *Mezei* was a returning permanent resident, he had forfeited the protections accompanying that status by his long absence. *Mezei*, 345 U.S. at 214.

context, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned," *Mezei*, 345 U.S. at 212, (quoting *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950)). *Compare Judulang* v. *Holder*, 132 S. Ct. 476, 485 (2011) (rejecting suggestion that Government could flip coins to decide discretionary relief applications); *Jean* v. *Nelson*, 472 U.S. 846, 854-55 (1985) (construing parole regulation to prohibit race discrimination and therefore not deciding whether *Mezei* applied). When the Government incarcerates people, it deprives them of liberty and must provide procedures to ensure that the deprivation is not arbitrary.

Zadvydas makes clear that the Government's power to exclude and its power to detain are distinct for due process purposes. The detainees there had lost all legal right to reside in the United States, but the Court nonetheless recognized their interest in "[f]reedom from . . . physical restraint," 533 U.S. at 690, which protects against arbitrary imprisonment "for any purpose." Resp. 27 (citing cases).

Seven of the nine justices in *Zadvydas* agreed on this point. Justice Kennedy, joined by Chief Justice Rehnquist, would have required procedures as to the detentions there, because "both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious." 533 U.S. at 721 (Kennedy, J., dissenting). *See also id.* at 692 (majority describing constitutional problem as "serious" and "obvious"). *See also* Law Professors Br. 19-20.[4]

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[4] Petitioners repeatedly assert that the *Mezei* dissenters would have approved of the draconian detention regime Petitioners advocate, ostensibly because Arriving Subclass

Petitioners maintain that *Mezei* precludes any due process protections here, because it upheld the summary exclusion and detention of a noncitizen denied entry. But while *Mezei* conflated the power to detain with the power to remove, that holding must be read in light of its peculiar circumstances: an exclusion resting on national security. Resp. 28-30; *see also* Br. of Law Professors 19-20, 23-25.[5] Mr. Mezei had been finally excluded *as a threat to national security*, and remained detained only because no country would accept him. As the Court explained, "to admit an alien barred from entry *on security grounds* nullifies the very purpose" of the exclusion order because it could unleash the very threat that the order sought to avoid. *Mezei*, 345 U.S. at 216 (emphasis added).

That rationale does not apply here. Individuals detained as national security threats are exempted from the Class, and releasing under supervision Subclass members who pose no flight risk or danger while their proceedings remain pending would not "nullify" the purpose of removal proceedings, which is to determine whether they may live here permanently. *See* Resp. 29.

Members receive hearings on the merits of their right to admission (i.e., removal hearings). However, the removal hearings provide no process with respect to detention, and the *Mezei* dissenters insisted on that right. *Compare* Br. 20 & Reply 7-8, *with Mezei*, 345 U.S. at 218 (Black, J., dissenting) ("The Founders abhorred arbitrary one-man imprisonments."); *id.* at 227 (Jackson, J., dissenting) (concluding that Mezei's *detention* could be enforced only through procedures "which meet the test of due process of law").

[5] *See, e.g.*, 345 U.S. at 207 (question presented "is whether the Attorney General's continued exclusion of respondent without a hearing amounts to an unlawful detention").

Second, these Arriving Subclass members have been screened in for full removal proceedings based on a finding that they have a "credible fear" of persecution. They thus stand in a fundamentally different position from Mr. Mezei, and from all other noncitizens at the border.

Whereas Mezei had lost any basis for seeking admission and been conclusively "denied entry," 345 U.S. at 212, these Arriving Subclass Members have passed a critical threshold in the admissions process, and their cases remain pending. Because they have been found (by a DHS asylum officer) to have a "significant possibility" of establishing eligibility for asylum, Congress has afforded them the right to remain here while their asylum applications are considered in full removal proceedings. And as the record in this case establishes, most will win the right to remain permanently. J.A. 98, tbl.28; J.A. 135, tbl.38; App. 40a.

Given that, under *Zadvydas,* individuals who had lost the right to live here nonetheless had a "liberty" interest in freedom from prolonged detention, noncitizens who *do* have a right to be here while their cases are adjudicated are entitled to at least as much due process protection. Unlike Mr. Zadvydas, they have *not* "been determined to be removable after a fair hearing under lawful and proper procedures." *Zadvydas*, 533 U.S. at 718 (Kennedy, J., dissenting).

Third, while some noncitizens detained at the border can avoid detention by returning home, Arriving Subclass members who seek asylum cannot. They face a "credible fear" of persecution. Resp. 2-5. Deportation "is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country." *INS* v. *Cardoza-Fonseca*,

480 U.S. 421, 449 (1987). The liberty interests of such individuals, who have often suffered horrific persecution and torture in their countries of origin, cannot be dismissed on the ground that they are free to go home, particularly given record evidence establishing that two-thirds of those initially found to have a "credible fear" won their cases even before the injunction. *See, e.g.*, J.A. 98, tbl.28; J.A. 135, tbl.38; App. 40a. *See also* J.A. 229 (Class member fled Ethiopia after government soldiers kidnapped and tortured him with electric shocks over the course of six months, and killed his father and brother); J.A. 227 (Class member abducted, burned, and deprived of food for days).

C. The Parole Process Does Not Satisfy Due Process Requirements.

Petitioners suggest that even if Arriving Subclass members have some liberty interests, the parole review process satisfies constitutional requirements. Reply 10.

The parole process does not satisfy due process. It includes no hearing before a neutral decision maker, no record of any kind, and no possibility for appeal. Outside the national security context, this Court has never permitted detention of such length without the basic requirement of a hearing before a neutral decision maker. And seven Justices in *Zadvydas* would have required such procedures even as to individuals who had conclusively lost the right to reside here. *See supra* Point I.B. *See also Zadvydas*, 533 U.S. at 723 (Kennedy, J., dissenting) (release processes "could be conducted by a neutral

administrative official") (citing *Morrissey*, 408 U.S. at 486).[6]

The record contains extensive evidence that the parole review process gives rise to prolonged arbitrary detention. Resp. 4-5, 30-31. Reviews are conducted informally by DHS officers (i.e., the jailing authorities). Officers make parole decisions—that result in months or years of additional incarceration—by merely checking a box on a form that contains no factual findings, no specific explanation, and no evidence of deliberation. *See, e.g.*, J.A. 234-35 (denying release, for however long proceedings will continue, because detainee was "flight risk" with no further explanation). There is no hearing, no record, and no appeal. J.A. 225-26, 334-35; App. 39a. The parole system lacks meaningful processes to correct even manifest errors, as Petitioners' own witness conceded. J.A. 226-34; App. 39a-40a. *See also* Resp. 6-7 (citing examples); Br. of Human Rights First et. al. 18 n.9; Br. of Americans for Immigrant Justice et. al. 21-27.[7]

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[6] IJs are akin to the neutral officials contemplated in *Morrissey* rather than "judicial officer[s]," 533 U.S. at 723 (Kennedy, J., dissenting), insofar as they serve under the direction of the Attorney General. *See* 8 C.F.R. 1003.10(a). In any event, while the analogy to post-conviction parole was appropriate in *Zadvydas*, which concerned individuals who had "been determined to be removable after a fair hearing under lawful and proper procedures," *Zadvydas*, 533 U.S. at 718 (Kennedy, J., dissenting), Arriving Subclass members are entitled to greater protections because they have not lost the right to live here.

[7] Petitioners claim the record evidence concerning egregious errors was contested, *see* Reply 11 n.3, but in each example cited the IJ ultimately resolved any factual disputes in the Subclass member's favor at their asylum hearings. For example, in the case identified by Petitioners, *see id.*, an Ethiopian man was

Petitioners do not contest that a large majority of Arriving Subclass Members win their cases.[8] Nor do they dispute their own witness's testimony that virtually none of the members of this Subclass have any criminal history. J.A. 98, tbl.28; J.A. 135, tbl.38; J.A. 328; App. 20a, 40a. While there was some disagreement on the margins about how to count detention lengths, *see infra* n.9, three points are not in dispute: Petitioners detained Arriving Subclass members without hearings for extremely long periods, J.A. 97, tbl.27; App. 40a (average of one year using method correcting for all sources of measurement bias); the parole process lacks any opportunity for detainees to be heard by a neutral decision maker; and, as Respondents' own witness testified, the parole process has no mechanism to catch even manifest errors committed by the detention officers because they exercise sole, unreviewable authority as to release. It routinely results in months, and often years, of pointless incarceration. J.A. 334-35, 339. *See generally* J.A. 226-35; App. 39a-40a.

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denied parole and detained for six months based on an erroneous finding that he was Somali and the officer's biased view that all Somalis were deceitful. The IJ ultimately granted him asylum from Ethiopia, after finding him credible and confirming his actual nationality. Decl. of Ahilan Arulanantham at 6, ECF No. 281-73 (observing that "[w]hen the DHS found that he had established a credible fear of return *on the exact same facts as he testified before this Immigration Court*, the DHS had apparently concluded that his lack of identity documents was not an issue" and that DHS conceded his "identify and name had properly been verified pursuant to" regulation).

[8] Petitioners' expert acknowledged that the parties' initial disagreements on detention lengths did not affect the case outcome data. J.A. 173.

No other detention regime permits the jailing authority to impose months or years of civil confinement simply by checking a box on a form, with no hearing, no record, and no appeal. Outside the national security context, the Court has never approved such prolonged periods of detention based on such cursory review. Where, as here, detention has become prolonged, due process requires individualized custody hearings to ensure that continued detention remains justified.

II. PROLONGED DETENTION UNDER SECTION 1226(c) WITHOUT INDIVIDUALIZED CUSTODY HEARINGS VIOLATES THE DUE PROCESS CLAUSE.

The due process requirements that govern prolonged detention also protect members of the Mandatory Subclass. They are detained for prolonged periods, on average more than *ten times* the average length in *Demore*. And the vast majority of them contest the entry of a removal order in their cases, whereas *Demore* was "decide[d] . . . on [the] basis" that the detainee had conceded deportability. 538 U.S. at 522 n.6.

Petitioners read *Demore* without regard to these limitations, claiming it exempted immigration detention from basic due process requirements in the civil detention context, and authorized prolonged detention without hearings, "so long as [it] serve[s a] 'purported immigration purpose,'" Reply 13, irrespective of whether prolonged detention *actually* serves a purpose and remains *reasonable* in relation to that purpose.

But *Demore* did not exempt detention under Section 1226(c) from basic due process principles. Rather, it applied those principles to the challenge at issue

there, which concerned individuals who were charged with certain criminal convictions, detained for brief periods, and who had conceded deportability. Those factual circumstances were critical to the Court's holding. Brief detention involves a comparatively minor deprivation of liberty, and the Government's interest in detaining someone to ensure removal nears its height where entry of a removal order is virtually certain. Ignoring *Demore*'s own limitations would set a sweeping precedent permitting detention far beyond what this Court has previously authorized.

Due process analysis also must consider that supervised release programs have now been shown, in thousands of cases, to be extraordinarily effective at ensuring compliance according to Petitioners' own witness. This is unsurprising, as the record shows that many Mandatory Subclass members are longtime lawful residents convicted of relatively minor offenses. The system Petitioners advocate, by contrast, utilizes a conclusive presumption—demonstrably false on the record in this case—that all Subclass members present too great a risk to be released under any conditions, even if the Government can make no showing of need. Due process does not permit the use of that conclusive prohibition when prolonged detention is at stake.

A. The Due Process Prohibition On Prolonged Arbitrary Detention Applies To Mandatory Subclass Members.

Due process does not permit prolonged incarceration absent an individualized hearing before a neutral decision maker to ensure that detention remains justified. *See supra* Point I.A.

That basic due process principle applies to the Mandatory Subclass. While this Court upheld detention without individualized custody hearings in *Demore*, that case involved an application of the principles underlying the Court's civil detention doctrine, not an abrogation of them.

Most important, *Demore* found the detention at issue permissible without individualized custody hearings because it was "brief," 538 U.S. at 513, 523. *Demore* distinguished *Zadvydas* on precisely this ground, stating that most detentions before it were shorter than the ninety days of mandatory detention *Zadvydas* permitted. 533 U.S. at 698.

Demore also limited its holding to detainees who had conceded their deportability, and therefore had little to lose by fleeing. 538 U.S. at 522 n.6 (case "decide[d] . . . on that basis"); *id.* at 518 (rule applies to a "*limited class of deportable* aliens") (emphasis added); *id.* at 521 (mandatory detention applies to "a subset of deportable criminal aliens").

As a result, *Demore* involved both less serious deprivations of liberty and stronger government interests than those at issue here. *See, e.g.*, *id.* at 513, 523.

Petitioners ignore these limitations, claiming *Demore* exempted the immigration detention system as a whole from this Court's civil detention precedent. Reply 11-12. In Petitioners' view, detention remains permissible, regardless of length, "so long as immigration detention continues to serve a purported immigration purpose." Reply 13. But detention does not serve an immigration purpose if the Government's interests can be met without incarceration. If an individual does not pose a sufficient flight risk or danger to warrant detention,

then the Government can accomplish its immigration purposes without detention, and detention serves no immigration purpose. And while *Demore* upheld Congress' categorical denial of release for *brief* detentions of persons who conceded deportability, it neither considered nor permitted *prolonged* detention without any individualized assessment of whether detention is justified, particularly as to those who do not concede that they will be ordered removed.

If accepted, Petitioners' attempt to extend *Demore* to authorize prolonged detention would constitute a dramatic expansion of the Government's authority to deprive noncitizens of their liberty, far beyond that authorized in *Demore* or any other case. If incarceration *always* remains permissible, regardless of its length or the detainee's individual circumstances, so long as the Government is pursuing removal proceedings in good faith, then detention will almost always be lawful while proceedings remain pending, with or without individualized custody hearings. On Petitioners' view, it does not matter whether the Government's immigration interests can actually be served without detention. That view would sanction unnecessary, and therefore arbitrary, detention.

B. Due Process Requires Individualized Custody Hearings For Mandatory Subclass Members Because Their Detentions Are Prolonged And They Have Not Conceded Deportability.

Mandatory Subclass members are detained for periods far longer than those the Court considered in *Demore*. Petitioners ignore *Demore*'s unambiguous statement that in 85% of the cases it considered, the average detention time was 47 days. 538 U.S. at 529. *Demore* assumed that, in outlier cases, mandatory

detention would "last [] . . . about five months in the minority of cases in which the alien cho[se] to appeal," *see id.* at 529-30, although that assumption was based on data provided to the Court that the Solicitor General now admits was incorrect.

Here, by contrast, detention exceeds six months *in every case* under the class definition, and the average detention for Mandatory Subclass members is nearly *ten times* more than the average in *Demore*. J.A. 92, tbl.20 (427 days). Even for appeals, the average is *three times* what *Demore* envisioned. J.A. 76, tbl.6 (448 days).[9]

Petitioners make much of the fact that the detainee in *Demore* was detained for slightly more than six months, but fail to note that he never claimed that his detention without a hearing was unlawful *because of its length*, and never sought a remedy for *prolonged* detention. *Demore*, 538 U.S. at 523 (explaining that

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[9] Petitioners' claim that many Class members' detention lengths are actually comparable to those in *Demore* rests in part on a mistake in their interpretation of the relevant data. Reply 12 & n.4. Petitioners focus on the so-called "in-period" detainees when citing data concerning detention length—those who became Class members only after the discovery period commenced. However, as Petitioners' own expert acknowledged, reliance solely on those detainees' data significantly skews average detention lengths because it tracks detention for only about two years, and therefore "censors" detention time. J.A. 172-73. *See also* J.A. 117, 126-27. Respondents' expert utilized a method that corrected for the different sources of measurement bias. Petitioners' expert did not dispute that Respondents' expert's method is "the standard method used by statisticians to correct for censoring bias" in situations involving offsetting forms of selection and censoring bias, J.A. 133, or that her method produced "the most reliable [results] on the average detention length for all individuals who qualify or will qualify as class members in the future." J.A. 134. That data is reported at J.A. 71-74, 92, 97.

Mr. Kim challenged even "brief" detention without a bond hearing under Section 1226(c)).

Moreover, *Demore*'s citation to average statistics for all mandatory detainees makes clear that the Court viewed Mr. Kim's case as involving unusually long detention. That assumption was correct as to the data at issue in that case, which focused on *all detentions* under Section 1226(c). Respondents, however, do not challenge the constitutionality of most detentions under Section 1226(c). Their challenge is limited to detentions exceeding six months. Mr. Kim's detention would have been unusually *short* were he a Class member. Nearly 90% of the studied Class members were detained for longer than Mr. Kim as of the time the Court ruled on his case (197 days). J.A. 73, tbl.3.

Petitioners cite no reason or authority for their claim that the "proper focus" of review here must be on "*all* aliens detained under Section 1226(c)," regardless of whether the detention has become prolonged, Br. 45. This case is *not* a challenge to Section 1226(c) detention "as a whole," *see id.* at 29 n.9, but only to the application of that statute to individuals detained for more than six months.

Petitioners' assertion that *Demore* authorizes prolonged mandatory detention also ignores the cases on which it relied, which carefully limited their holdings (as did *Demore* itself) so as not to authorize prolonged detention.

Demore relied heavily on *Carlson* v. *Landon*, 342 U.S. 524, 546 (1952), which made clear that it was not addressing prolonged detention. *See Demore*, 538 U.S. at 523-25. The detainees in *Carlson* challenged the Government's authority to detain them solely on the basis of dangerousness while their removal cases were pending. 342 U.S. at 526-27. *Carlson* upheld

their detention, but stressed that the "problem" of "unusual delay in deportation hearings is not involved in this case." *Id.* at 546. Subsequent cases recognized that *Carlson* had so limited its holding. *See Zadvydas*, 533 U.S. at 691 (recognizing that *Carlson* did not consider the "problem of . . . unusual delay") (omission in original); *Mezei*, 345 U.S. at 216 n.13 (noting that *Carlson* explicitly declined to consider cases of "unusual delay,"); *id.* at 223 (Jackson, J., dissenting) (citing *Carlson* for proposition that "[e]ven the resident, friendly alien may be subject to executive detention without bail, *for a reasonable period*") (emphasis added).

Demore also relied on *Reno* v. *Flores*, 507 U.S. 292, 309 (1993), which upheld the brief custodial detention of children while removal proceedings are pending. Bond hearings were available, *id.* at 299, but *Flores* nonetheless emphasized the brevity of the detention at issue. *Id.* at 314 (average of 30 days). In responding to plaintiffs' claim that the scheme could authorize more prolonged detention, the Court stressed that proceedings "must be concluded with 'reasonable dispatch,'" and that there was "no evidence" of detention "for undue periods" or that "habeas corpus is insufficient to remedy particular abuses." *Id.* Here, there is ample evidence of both. Resp. 8, 23; *infra* Point III.B.

C. *Demore* Does Not Govern Here Because Mandatory Subclass Members Are Litigating Substantial Defenses.

Subclass members' prolonged detention renders *Demore* inapplicable not simply because of its length, but also because of the reasons underlying their lengthy proceedings. Unlike the detainee in *Demore*, the vast majority of Subclass members take time to

litigate their cases because they have substantial defenses to removal. Br.19-21.[10]

Individuals who have substantial defenses, and therefore have an opportunity to maintain the right to reside in the United States as a result of their removal proceedings, do not present the presumptive flight risk or danger concerns that underlie *Demore*. Such individuals have obvious incentives to appear for proceedings that deportable noncitizens do not have, because individuals with substantial defenses may avoid entry of a removal order by appearing for proceedings. Such individuals also generally have stronger ties to this country and less serious criminal histories than other people detained under Section 1226(c). *See generally* Brief of National Immigration Project of the National Lawyers Guild 13-16. And because they are far more likely to win their cases, the risk that they will flee is correspondingly diminished, as is the Government's interest in detaining them.

In contrast, *Demore* repeatedly limited its holding to "deportable criminal aliens," 538 U.S. at 521, and in doing so focused on noncitizens as to whom entry of a removal order was virtually inevitable. *See, e.g.*, *id.* at 518 (Section 1226(c) enacted because "INS

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[10] Individuals were classified as having a substantial defense if they contested whether their offense triggering mandatory detention or if they were eligible for relief that would prevent entry of a removal order. While the Government does keep data on whether individuals apply for relief, it does not track whether someone contests the charges; it tracks only whether such challenges are successful. 70% of Subclass members were eligible for relief from a removal order, and 4% won their challenges to the threshold charge of removability. J.A. 95-96. Therefore, more than 74% of Subclass members presented a substantial defense.

could not even identify most deportable aliens, much less locate them and remove them from the country.") (emphasis omitted); *id.* (relying on study regarding the time needed to "remove every criminal alien already subject to deportation"); *id.* (referring to "INS' near-total inability to remove deportable criminal aliens").[11]

Entry of a removal order is *not* inevitable as to the overwhelming majority of Section 1226(c) Subclass members. At least three quarters of Subclass members have a substantial defense that, if successful, will prevent entry of a removal order. Resp. 19. Thirty-eight percent of them won their cases even while detained. J.A. 135. *See also* J.A. 520-23, 574-75 (detention makes litigation far more difficult).

For example, the most common form of relief for which Subclass members are eligible is LPR cancellation of removal. 8 U.S.C. 1229b; J.A. 94, tbl.22. By definition, such individuals had no aggravated felony conviction and at least seven years of lawful residence, including five as LPRs. Forty-nine percent of studied Subclass members were eligible for that form of relief, J.A. 94, tbl.22, and 39% of those that sought relief won it. J.A. 95, tbl.23.

Petitioners contend that Congress rejected the type of individualized assessments that would allow

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[11] *Demore* was particularly focused on people convicted of aggravated felonies, as Mr. Kim allegedly was. *See* 538 U.S. at 518 (specifically referencing aggravated felonies); *id.* at 520 n.5 (rejecting reliance on study that included only a small number of people with aggravated felony charges); *id.* at 521 (relying on legislative history specifically about people convicted of aggravated felonies). Virtually all Subclass members with substantial defenses are *not* convicted of aggravated felonies. *See infra* Point III.B.

consideration of whether a detainee has a substantial defense because "*IJ*s could not predict ex ante which released criminal aliens would reoffend or flee." Reply 15 (emphasis added). But this statement appears nowhere in *Demore* or the legislative history. Rather, *Demore* stated that the evidence Congress considered in the early 1990's showed that "in practice" *the INS* released people due to "limitations on funding and detention space," 538 U.S. at 519, not after IJ hearings on flight risk and danger. And the evidence about those "discretionary release" programs concerned "deportable criminal aliens," not people with substantial defenses. *Id.* at 528.

The record demonstrates the Government has since implemented intensive supervised release programs. It contains the results of thousands of cases by IJs operating under the injunction—information not available when this Court decided *Demore*. Each year, approximately 20,000 people receive supervised release under the intensive supervision programs. J.A. 407, 385. Compliance rates in some regions stand "at, if not close to, 100 percent," J.A. 565, and they are comparably high nationwide. J.A. 433.

Petitioners contend these supervision programs achieve high compliance rates only for "low risk individuals." Reply 16 (citing J.A. 364). Many Subclass members *are* low risk, because the Government interprets Section 1226(c) to require the detention of people convicted of simple drug possession and other minor offenses, even if they have lived here lawfully for years and have a substantial defense to removal. *See, e.g.*, J.A. 314 (Class members detained for 600 to 750 days based on simple possession offenses with sentences of 30 to 90 days); Resp. 39 (individuals detained for years for drug possession granted bond after IJ hearings). *See*

also J.A. 566-67 (Government witnesses acknowledging individuals with substantial challenges present lower risk).[12]

In any event, the question is not whether all Subclass members should receive supervised release, but whether IJ's may *consider* supervised release and order the release of individuals who need not be detained when supervision would adequately serve the Government's interests. Such *consideration* ensures that detention actually remains justified.

The Court should reject Petitioners' remaining arguments concerning the Mandatory Subclass. They quarrel with the definition of "substantial defenses," which they say should be limited to whether "the charges ... are valid." Reply 14. The definition properly focuses on whether detainees can expect to *win their cases* by maintaining their immigration status; such individuals have powerful incentives to appear and already present little danger because of their comparatively minor criminal histories.

Petitioners claim the detainee in *Demore* sought relief, Reply 15, but he sought withholding of removal, which does not qualify as a "substantial defense" because it does not prevent entry of a removal order, and therefore does not bar removal to third countries or even to their own country under

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[12] Petitioners rely on inapposite and unreliable extra-record data purportedly bearing on flight risk. Resp. 41. They offer no response to the serious flaws in the data, inviting the same types of data errors that occurred in *Demore*. *Id.* Unlike in the cases on which they rely, Reply 16 (collecting cases), Petitioners had ample opportunity to develop a record during discovery. Petitioners claim Respondents cited an extra-record study, Reply 16, but Respondents' purpose was to illustrate the flaws in Petitioners' extra-record data, not to displace the record. J.A. 564-65.

some circumstances. Brief of National Immigration Project of the National Lawyers Guild 8 n.6. Petitioners also contend the record evidence "exaggerates" the prevalence of substantial defenses because it fails to assess the strength of each case. Reply 15. However, only IJs could conduct such assessments, and while the injunction permits them to do so when considering whether to grant bond, Petitioners' approach entirely forecloses any individualized determinations. Under Petitioners' regime, Subclass members who pose no flight risk or danger and who will *probably win* relief cannot *even ask* for release on bond, even where the presiding IJ knows they are likely to prevail and present no risk. Due process does not permit prolonged detention under such circumstances, as it serves no valid purpose.

III. UNDER THE DUE PROCESS CLAUSE, DETENTION BECOMES PROLONGED AFTER SIX MONTHS, AND AN INDIVIDUALIZED CUSTODY HEARING IS REQUIRED.

Our legal system has long recognized six months as a significant period of confinement beyond which additional process is required. The Court has also recognized the significance of that period in analogous civil detention contexts, including in *Zadvydas* and in the civil commitment context. National security cases aside, the Court has never approved civil detention of the length here—averaging over a year, with hundreds detained over two years—without an individualized custody hearing.

The relief ordered below takes an appropriate administrable approach to implementing the Fifth Amendment's basic guarantee of liberty, as this

Court has done under similar circumstances. It was well within the lower courts' equitable discretion. *See infra* Point III.A.

Under the Court's civil detention doctrine, due process protections do not evaporate if a detainee can seek habeas relief. Moreover, the record as well as decades of judicial findings confirm that a case-by-case habeas approach fails to protect Class members' interest in physical liberty. *See infra* Point III.B.

At individualized custody hearings, the IJ should consider flight risk and danger, because those are the only permissible bases for these civil detentions. Petitioners fear dilatory conduct by detainees, but experience under the injunction shows their fear is unjustified. IJs can consider dilatory conduct when assessing flight risk and thereby prevent any abuse. *See infra* Point III.C.

A. The Due Process Clause Requires A Custody Hearing For Class Members After Six Months Of Civil Detention.

"It is not difficult to grasp the proposition that six months in jail is a serious matter for any individual . . . ." *Muniz* v. *Hoffman*, 422 U.S. 454, 477 (1975). The recognition that six months is a substantial period of confinement—and therefore requires additional process to support continued incarceration—is deeply rooted in our legal tradition. With few exceptions, "in the late 18th century in America crimes triable without a jury were for the most part punishable by no more than a six-month prison term." *Duncan*, 391 U.S. at 161 & n.34. Consistent with this tradition, the Court has found six months to be the limit of confinement for a criminal offense that a federal court may impose

without the protection afforded by jury trial. *Cheff*, 384 U.S. at 380 (plurality opinion).

The Government does not generally have greater power to deprive persons of liberty under civil rather than criminal law. That principle is reflected in the use of six months as a dividing line in civil contexts as well. In the civil commitment context, for example, this Court rejected a state's assertion of "the power to confine petitioner indefinitely, without ever obtaining a judicial determination that such confinement is warranted." *McNeil*, 407 U.S. at 249. *McNeil* observed that the state's own maximum of "six months" for observation on an ex parte commitment order provided "a useful benchmark" for the outer limits of civil confinement without a hearing. *Id.* at 250-52.

A six-month hearing rule also finds support in *Zadvydas* and *Demore*. In *Zadvydas* the Court observed that "Congress previously doubted the constitutionality of detention for more than six months," 533 U.S. at 701, and authorized the *release* of individuals who had "been determined to be removable after a fair hearing under lawful and proper procedures." *Id.* at 718 (Kennedy, J., dissenting). The case for requiring neutral evaluation before allowing detention to continue beyond six months is even stronger than in *Zadvydas*, because the Class here includes only individuals who have *not* lost the right to reside in this country. *Cf. id.* at 725 (Kennedy, J., dissenting). The relief ordered is also more limited than in *Zadvydas*, as it provides only for an individualized *hearing* on flight risk and danger, and not necessarily for release. *Id.* (arguing custody procedures should focus on flight risk and danger, not foreseeability of removal).

Similarly, in upholding "brief" mandatory detention, *Demore* emphasized that even outlier cases would typically conclude in "about five months." 538 U.S. at 529-30. As noted previously, both Congress and the Executive Branch have used that same time period in other immigration detention contexts, including in national security cases, as the temporal limit beyond which greater process must be provided. Resp. 38.

In short, outside the national security context, this Court has never authorized civil detention beyond six months without individualized hearings as to whether detention is justified in light of its purpose.

Conducting a *hearing* does not require *release* at any particular point in time. A hearing merely enforces the principle that civil detention beyond six months is unwarranted absent a showing of flight risk or danger. DHS routinely overcomes that presumption: roughly *half* of Class members remain detained after hearings—more often than not because IJs decline to set bond based on individualized review. J.A. 526.

The relief ordered below also is consistent with this Court's longstanding recognition that administrable rules may be necessary to vindicate constitutional protections. *See* Resp. 37 (citing *Maryland* v. *Shatzer*, 559 U.S. 98, 110 (2010) (14-day limit in interrogation context because "case-by-case adjudication" would be "impractical")); *McLaughlin*, 500 U.S. at 55-56 (48-hour limit on detention prior to probable cause hearing "reasonable" to "provide some degree of certainty" that States act "within constitutional bounds"). *Cf. Zadvydas*, 533 U.S. at 700-01 (citing *McLaughlin* and *Cheff* and adopting six-month rule "for the sake of uniform administration" and avoid the need for lower courts to make "difficult

judgments"). As the Court has recognized, in some circumstances "it is necessary to draw a line." *Duncan*, 391 U.S. at 160-61.

Administrable rules protect "'the individual against arbitrary action of government,'" which this Court "ha[s] emphasized time and again [is] 'the touchstone of due process.'" *Cty. of Sacramento* v. *Lewis*, 523 U.S. 833, 845 (1998) (alteration omitted). They are particularly appropriate when, in their absence, courts or Government officials would be left "at sea" in attempting to enforce constitutional requirements. *Cheff*, 384 U.S. at 380 (plurality opinion). *See also Shatzer*, 559 U.S. at 110 (specifying time period because "law enforcement officers need to know, with certainty and beforehand," when they can renew interrogation).

The relief ordered below also may be affirmed as a permissible exercise of the district court's equitable power to remedy constitutional violations. Although the district court ruled on statutory grounds by applying constitutional avoidance doctrine, it expressly viewed the injunction as necessary to vindicate Class members' constitutional rights. App. 143a ("the government is constitutionally obligated to provide those hearings"). The Ninth Circuit likewise understood the hearings to serve that function. *See also* App. 30a (affirming district court in part because hearings ensure detention remains supported by "a legitimate interest reasonably related to continued detention"). The record is replete with instances of Class members being incarcerated for periods far longer than six months without any hearing finding a need for such confinement. And the relief ordered is reasonable. The injunction remains flexible by providing a two-week window for setting the hearing,

and by not requiring any hearing where removal or release is imminent. App. 17a, 31a.

B. Requiring Class Members To Seek Relief From Prolonged Detention Solely Through Habeas Would Perpetuate The Denial Of Due Process.

Petitioners believe detainees must file habeas petitions to vindicate their due process rights. Resp. 25-26. But this Court has never excused the Government from providing due process because of the potential availability of habeas relief. *Id.* The Government has an obligation to provide due process regardless of whether a detainee files a habeas petition. *Sopo* v. *U.S. Attorney Gen.*, 825 F.3d 1199, 1217 n.8 (11th Cir. 2016). The record and experience confirm, moreover, that relegating Class members to case-by-case habeas litigation would perpetuate, not prevent, prolonged and unjustified detention.

The district court ordered hearings at six-month intervals based upon extensive and uncontested evidence that detainees face severe barriers in accessing the courts. *See, e.g.*, J.A. 304-09, 518-20. For example, of the approximately 1,000 identified Class members over one year in the Central District, 469 of them were detained for more than a year without an individualized custody hearing, 205 for more than 18 months, and 86 for more than two years. J.A. 73.

Both courts below recognized that detainees lack the legal and language proficiency to litigate on their own. *See* Resp. 26 (quoting App. 48a ("Detainees, who typically have no choice but to proceed *pro se*, have limited access to legal resources, often lack English-language proficiency, and are sometimes illiterate.")); App. 143a (finding that the "bond hearing process

would be fraught with peril if the Court were to place the burden on detainees to request a bond hearing").

The record further establishes that many Class members, including longtime lawful residents with U.S. citizen family members and persons convicted of relatively minor offenses, did not obtain bond hearings through habeas even though they presented minimal flight risk or danger. This evidence cannot be dismissed as "anecdote," Reply 15; it derives from a comprehensive expert study of approximately 1,000 Class members over a lengthy discovery period. For example, of the individuals with a criminal history, more than half had received a sentence of no more than six months. *See* Resp. 9. More than half of the Mandatory Subclass had also lawfully resided here for seven years, with at least five years as an LPR, and with no aggravated felony convictions. *See* J.A. 94.

In theory, all of these individuals could have filed habeas cases before the injunction issued, but in reality they were unable to do so. The record thus confirms that a case-by-case habeas approach would foreclose any detention review for many detainees.

The availability of habeas would also fail to remedy the constitutional harm of prolonged detention without a hearing even for the few detainees who could file a habeas petition. Habeas petitions routinely require months or years to resolve. As the First and Second Circuits found, habeas petitions do not provide a meaningful remedy even for extremely prolonged detention. *Lora* v. *Shanahan*, 804 F.3d 601, 615 (2nd Cir. 2015) ("some habeas petitions are adjudicated in months and others are not adjudicated for years"), *cert. denied*, 136 S. Ct. 2494 (2016); *Reid* v. *Donelan*, 819 F.3d 486, 497-98 (1st Cir. 2016) ("federal habeas litigation itself is both complicated

and time-consuming"). *See also* Resp. 26; AIJ Amicus 31 (reporting average length to issue a decision on a prolonged detention habeas is 237 days in the First Circuit, 168 in the Third Circuit, 409 in the Sixth Circuit, and 578 in the Eleventh Circuit). These decision times alone render habeas particularly inadequate as the sole vehicle to challenge prolonged detention.

Case-by-case habeas adjudication of tens of thousands of prolonged detention cases cannot be effectively managed in federal courts. District courts must familiarize themselves with a previously-unknown removal case, all to decide whether to order a bond hearing where an IJ will reconsider largely the same evidence. Even circuits that rejected the six-month rule acknowledged this problem. *Reid*, 819 F.3d at 498 (federal courts' "involvement is wastefully duplicative" and results in "inefficient use of time, effort, and resources"); *Ly* v. *Hansen*, 351 F.3d 263, 272 (6th Cir. 2003) ("federal courts are obviously less well situated to know how much time is required to bring a removal proceeding to conclusion").

Based on extensive findings reviewing immigration detention cases over the past decade, the courts of appeals reached a consensus that a case-by-case approach without temporal guidelines produces arbitrary outcomes. The Second Circuit adopted a six-month rule partly for that reason. *See Lora*, 804 F.3d at 615-16 (observing "the pervasive inconsistency and confusion exhibited by district courts in this Circuit when asked to apply a reasonableness test on a case-by-case basis," and adopting six-month rule to "avoid[] the random outcomes resulting from individual habeas litigation," particularly where courts have been "burdened by a surge in

immigration appeals and a corresponding surge in the sizes of their immigration dockets").

The Ninth Circuit did the same based on a decade of individual decisions that failed to end prolonged arbitrary detention. App. 111a-14a, 131a (directing class certification to "facilitate development of a uniform framework for analyzing detainee claims to a bond hearing" that "would render management of these claims more efficient for the courts" and "benefit many of the putative class members by obviating the severe practical concerns that would likely attend them were they forced to proceed alone").

Even the circuits that rejected a bright-line approach recognized its practical benefits. The Third Circuit rejected a six-month rule in favor of a case-by-case habeas approach in *Diop* v. *ICE/Homeland Sec.*, 656 F.3d 221, 234 (3d Cir. 2011), but four years of subsequent litigation revealed that system unworkable. In 2015, it acknowledged the uncertainty engendered by the case-by-case approach and suggested alternative time periods akin to a bright line rule. *Chavez-Alvarez* v. *Warden York Cty. Prison*, 783 F.3d 469, 477 n.11 (3d Cir. 2015) (stating a bond hearing is needed between six months and one year "for the sake of providing clear guidance to the" agency and district courts). *See also Sopo*, 825 F.3d at 1217 ("[t]he need for a bond inquiry is likely to arise in the six-month to one-year window"); *Reid*, 819 F.3d at 497-98 ("plethora of problems" associated with case-by-case approach, including "wildly inconsistent determinations" by district courts). *See also* Resp. 37 n.13. As Judge Pryor explained, "despite the best efforts of judges, courts have been unable to apply flexible reasonableness standards in a manner that generates predictable, consistent, and fair outcomes."

Sopo, 825 F.3d at 1226 (Pryor, J., concurring in part and dissenting in part). The experiences of federal appellate courts confronted with this problem thus counsel strongly in favor of a bright-line rule.

Petitioners argue that a bright-line rule encourages dilatory tactics. Br. 11, 13, 24. No evidence supports that claim. In fact, adjudication times in the courts reviewing detainees' cases in the Los Angeles area have shortened since the injunction went into effect four years ago.[13] IJs considering whether to release detainees usually also adjudicate the merits, and therefore can identify dilatory tactics. Such conduct could warrant denial of release on the ground that a detainee who prolongs incarceration to avoid deportation presents a flight risk. IJs thus can address dilatory tactics, but were there any doubt as to this point, this Court can clarify that dilatory tactics will not be tolerated.

C. The Government's Position That Relief Should Be Available Only In Cases Of "Unreasonable Government Delay" Contravenes Settled Due Process Doctrine.

In addition to asserting that Class Members may only obtain review by filing habeas petitions (rather

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[13] *Compare* Decl. of Susan Long, Ex. C, ECF No. 281-6 (average case processing times in FY2013 where relief was granted was 93 days for Mira Loma Detention Facility, 306 days for Orange County Detained, and 648 days for Adelanto Detention Facility East), *with* TRAC Immigration, *Immigration Court Processing Times by Outcome* (Dec. 2016), http://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php (average case processing times in FY2016 where relief granted was 116 days for Adelanto Detention Facility East, 164 days for Orange County Detained, and 218 days at Adelanto Detention Facility West).

than seeking it directly from IJs), Petitioners contend that the threshold question at any custody hearing should be whether the Government has unreasonably caused delay. Br. 47-48. On their view, if the Government has not unreasonably delayed, no individualized consideration of the detainee's flight risk or danger is warranted. Petitioners' position is contrary to this Court's due process precedents and disregards the factual record.

If the due process test depends on the extent of Government delay, as Petitioners propose, then the test does not serve its core function: to ensure that detention remains reasonably related to its purpose. If an individual presents little flight risk or danger, their prolonged detention serves no valid immigration purpose and is unwarranted. That remains true whether or not the Government has caused unreasonable delay.

Petitioners' focus on whether the Government has engaged in unreasonable delay erroneously presumes that Class members otherwise bear responsibility for the length of their detentions. The record demonstrates that Petitioners have structured immigration proceedings to *require* detainees to seek multiple adjournments to present their defenses. *See* Resp. 23-24; *see also* Br. of Retired IJs and BIA Members 2-6. Furthermore, detainees have no control over how long the BIA and circuit courts take to resolve appeals, which routinely take years. Resp. 25.

Petitioners' approach would lead to the type of pervasive inconsistency the circuits uniformly decry. *See supra* Point III.B. Judges (whether district courts, as Petitioners propose, or IJs) will have to assign blame for delays. Is delay unreasonable if a busy docket triggers lengthy continuances? *See, e.g.*, Resp. 24 (IJ continued matter for four months and

denied motion to shorten continuance). What if the delay arises from a different sub-agency's backlogs in processing applications? *See* J.A. 32-33 (class member detained for over a year while DHS processed and granted I-130 petition). How should a judge "count" the time spent detained pending an appeal by the Government? J.A. 235 (class member detained 7 months during DHS appeal). Attempting to determine the extent of the Government's responsibility for delay will itself introduce needless litigation and exacerbate inconsistency.

Mr. Rodriguez's case illustrates the flaws with Petitioners' approach. Petitioners dismiss any due process concerns with his three-and-a-half year detention because "three quarters of that time was under a stay of removal he requested" and he could have sought to "expedite" the appeal. Reply 14. But the Government successfully requested and obtained three separate stays of his case pending resolution of another, which delayed consideration of his case for nearly two years. *See* Corrected Pet'n for Habeas Corpus 8-10 (D.Ct. May 29, 2007); J.A. 258. It then moved to remand his case after belatedly conceding he was not removable as charged. *See* J.A. 258.[14]

Whether the "fault" for this delay lies with him, the Government, or neither party has nothing to do with the core due process concern the hearing is designed

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[14] Petitioners also suggest the record supports alternative "time frames" for conducting hearings based on the average length of Class members' cases. Reply 20-21 (in 90% of cases, IJ proceedings completed within 14 months and BIA appeals within 20 months). Petitioners would base the constitutionally-acceptable time period for detention without a hearing on the length of bureaucratic delays driven by court funding shortfalls, rather than liberty interests. Nothing in the Court's civil detention precedents supports that approach.

to address: whether further prolonged detention is reasonable in light of whatever flight risk or danger he presents.

* * *

For these reasons, the Court should affirm the relief ordered below of individualized custody hearings after approximately six months, held directly before IJs, to protect Class members' due process rights.

IV. DUE PROCESS REQUIRES CERTAIN SAFEGUARDS AT CUSTODY HEARINGS FOR PROLONGED DETENTION.

At prolonged detention custody hearings, due process requires that the Government bear the burden of proof; the standard of proof be clear and convincing evidence; and the IJ consider the length of detention in determining whether detention remains justified. Due process also requires periodic hearings for those individuals who face additional prolonged detention.

A. Due Process Requires The Government To Bear The Burden Of Proof By Clear And Convincing Evidence.

1. The Government Must Bear the Burden of Proof.

In every context where the Court has considered the constitutionality of civil detention or comparably severe deprivations of individual liberty, the Government has borne the burden of proof. Resp. 49. In civil detention cases, the Court has struck down schemes that place the burden on the detainee. *See, e.g., Foucha,* 504 U.S. at 81-83; *see also Zadvydas,* 533 U.S. at 692 (finding post-final-order custody review procedures deficient because, *inter alia,* they

placed burden on detaince). Conversely, the Court has upheld civil detention schemes that place the burden on the Government. *See, e.g.*, *Salerno*, 481 U.S. at 741; *Kansas* v. *Hendricks*, 521 U.S. 346, 364 (1997). When the Court has considered other "particularly important individual interests," *Addington* v. *Texas*, 441 U.S. 418, 424 (1979), such as parental termination, deportation, and denaturalization, the burden of proof has been on the Government, not the individual. Resp. 49 (citing cases).

The Court should not deviate from the established rule here. As in the civil commitment and pretrial detention contexts, because the Government seeks to deprive Class members of physical liberty to prevent future danger or flight, it must bear the burden of proof. *See Addington*, 441 U.S. at 425 (standard of proof "reflects the value society places on individual liberty").

2. The Court's Precedent Requires the Standard of Proof To Be Clear and Convincing Evidence.

The Court repeatedly has held that when the Government seeks to deprive an individual of a "particularly important individual interest[]" that is "more substantial than mere loss of money," *id.* at 424, it bears the burden of proof by clear and convincing evidence. Br. 49 (citing cases).

Although the Bail Reform Act uses a "preponderance of the evidence" standard for flight risk determinations, it does so in the context of the "stringent time limits of the Speedy Trial Act" on pretrial detention, *Salerno*, 481 U.S. at 747, not the prolonged detention lengths at issue here. *See* 18 U.S.C. 3161(c)(1) (requiring criminal trial to begin within seventy days of indictment); *Salerno*, 481 U.S.

at 747 n.4 (expressing "no view as to the point at which detention in a particular case might become excessively prolonged [under the Act], and therefore punitive, in relation to Congress' regulatory goal"). Greater protections are required when detention becomes prolonged. *See supra* Point I.A; *see also Zadvydas*, 533 U.S. at 690 (recognizing need for greater governmental justification as detention length increases).

3. Application of the *Mathews* v. *Eldridge* Due Process Standard Also Demonstrates That the Government Must Bear the Burden by Clear and Convincing Evidence.

Under the framework set forth in *Mathews* v. *Eldridge*, the Court balances the private interest at stake, the risk of erroneous deprivation if the detainee bears the burden, and the corresponding imposition on the Government. 424 U.S. at 335.

Here, the prolonged incarceration Class members suffer deprives them of a "particularly important" interest. *Addington*, 441 U.S. at 424. *See also Zadvydas*, 533 U.S. at 690.

Unless the Government bears the burden by clear and convincing evidence, the risk of erroneous deprivation of that liberty interest in custody hearings is impermissibly high. The Government is represented at hearings by attorneys familiar with immigration court procedures, while the noncitizen is by definition detained, often unrepresented, and frequently lacks English proficiency. *See supra* Point III.B. *Cf. Santosky* v. *Kramer*, 455 U.S. 745, 762-63 (1982) (requiring clear and convincing evidence at parental termination proceedings because "numerous factors combine to magnify the risk of erroneous

factfinding" including that "parents subject to termination proceedings are often poor, uneducated, or members of minority groups" and "[t]he State's attorney usually will be expert on the issues contested").

Moreover, the Government's attorneys are far more able to produce documents and other evidence to meet their burden than are incarcerated Class Members, who would otherwise be tasked with obtaining records—including court documents, marriage and birth certificates, or actuarial risk statistics—after having spent at least six months in detention, where they have limited access to the Internet, mail, phone, and a reduced ability to pay for and store records. *See* J.A. 304-06, 520-24; App. 143a (district court finding that the "bond hearing process would be fraught with peril if the Court were to place the burden on detainees to request a bond hearing").

The risk of erroneous deprivation is equally substantial for Arriving Subclass Members. DHS has by definition had six months to collect information (including by interviewing the detainee, who is incarcerated and readily available). DHS already verifies asylum-seekers' identity as part of the application process. *See* 8 U.S.C. 1158(d)(5)(A)(i) (requiring identity check); 8 C.F.R. 1003.47. Even beyond information supplied by the detainee, DHS has access to the detainee's immigration records, other law enforcement records, and State Department, Department of Defense, intelligence, and international (including INTERPOL) databases on a real-time basis, including through biometric fingerprinting.[15] If an individual detainee is a recent

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[15] *See* DHS, *Privacy Impact Assessment for the TECS System: CBP Primary and Secondary Processing* 9-10 (Dec. 22, 2010),

entrant who lacks any community ties, who has no one to vouch for him, and whose background truly cannot be verified after the Government makes an effort to do so, the Government may present that information as evidence of flight risk and the IJ may deny release. This would not be inconsistent with placing the burden on the Government.

Finally, placing the burden on the Government imposes a minimal burden. Four years of record evidence shows that the Government has ample information from which to make its case for continued detention, as it prevents release in approximately half of all cases. *See* J.A. 528, fig.1, 529, fig.2. *Cf. Zadvydas*, 533 U.S. at 723-24 (Kennedy, J., dissenting) (reviewing release rates in assessing placement of burden of proof).

4. The Relief Ordered Below Is Consistent With the Court's Plenary Power Decisions.

Petitioners' principal response to the additional safeguards ordered by the Ninth Circuit is that the Government need only show a "facially legitimate and bona fide" basis for detention under the plenary power doctrine, *see* Br. 54 (citing *Fiallo*, 430 U.S. at 794-95).

But the cases Petitioners cite do not concern detention at all, let alone prolonged detention, where the plenary power is "subject to important constitutional limitations." *See* Op. 51-52 (citing *Zadvydas*, 533 U.S. at 695). *Fiallo* concerned the

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https://www.dhs.gov/xlibrary/assets/privacy/privacy-pia-cbp-tecs.pdf; DHS, *Privacy Impact Assessment for the Automated Biometric Identification System (IDENT)* 3-5 (Dec. 7, 2012), https://www.dhs.gov/sites/default/files/publications/privacy-pia-nppd-ident-06252013.pdf.

terms under which Congress could deny *admission* (by denying citizenship). 430 U.S. at 788-89. The only other opinions of the Court to apply that standard involved the *admission* of noncitizens. *See Din* v. *Kerry*, 135 S. Ct. 2128, 2139 (2015) (Kennedy, J., concurring) (citing *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972)). As Justice Kennedy has explained, in those cases the breadth of "congressional power to make rules for the exclusion of aliens" justified limited review of the "executive officer's decision denying a visa." *Id.* at 2140.

Here, in contrast, Class members face prolonged detention because no decision concerning their deportation or admission has been made; many of them were already admitted, and many others will be granted admission as a result of the proceedings. Resp. 9-10.[16] The relief ordered below thus comports with Congress's plenary power over admissions.

B. The Government Must Provide Periodic Hearings To Support Prolonged Detention.

Under 8 C.F.R. 1003.19(e), a detainee may request an additional custody hearing based on changed circumstances. Br. 54-55. But because the agency does not count additional time in detention as a "changed circumstance," a detainee like Mr. Rodriguez cannot obtain a new custody hearing based on the passage of time. J.A. 317. Due process, however, requires periodic hearings for those who remain detained for prolonged periods after an initial hearing to assess whether continued detention

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[16] Respondents cite the oral argument transcript and Justice Breyer's opinion in *Demore* regarding the standard that should govern *initial* detention under 8 U.S.C. 1226(c), Reply 23, but this case concerns *prolonged* detention.

remains reasonable in relation to its purpose. *See Mathews*, 424 U.S. at 335 (greater procedural protections required when the private interests at stake are weightier). This Court has recognized that "[a] confinement that is in fact indeterminate cannot rest on procedures designed to authorize a brief period of observation." *McNeil*, 407 U.S. at 249. In *Jackson* v. *Indiana*, the Court found lengthy pretrial detention of incompetent criminal defendants unconstitutional where "[t]here is no statutory provision for periodic review of the defendant's condition." 406 U.S. at 720.

Application of the *Mathews* due process standard demonstrates the need, during prolonged detention, for periodic hearings. The deprivation of liberty for Class members detained for longer than six months is profound. It is undisputed that even after six months of incarceration (when they become Class members), many still face lengthy future detention, often for years. More than half of Class members detained past six months were still detained at 12 months; 23% of them were still detained at 18 months; and 10% were still detained at 24 months. J.A. 74-75 & tbl.4; App. 18a-19a. Lead Plaintiff Alejandro Rodriguez was detained for more than three years and three months, and would have been detained for seven years if not for this case. *See* J.A. 257-60.

Finally, conducting periodic hearings imposes minimal costs on the Government. Petitioners stipulated that "the cost of providing a bond hearing should [not] be considered in this case as a factor weighing in [their] favor." J.A. 588. Petitioners already conduct numerous bond hearings; they are typically brief (ten to fifteen minutes) and often occur via video conference. *See* J.A. 573. And because detention costs dwarf supervision costs, Mot. for

Summ. J. 20-21, ECF No. 281, hearings for Class members have saved millions of dollars. J.A. 529, fig.2; J.A. 88-89, tbl.18.

C. Immigration Judges Must Consider Length Of Detention At Prolonged Detention Custody Hearings.

This Court's focus on detention length in *Demore* and *Zadvydas* demonstrates why the length of past detention must be considered as a factor at custody hearings. As detention length grows, greater justification is required to sustain it. *Zadvydas*, 533 U.S. at 701. *See also* Br. 47 (conceding that longer detention requires greater scrutiny). Thus, when courts have considered *prolonged* pretrial detention, they have required consideration of additional factors "such as the length of the detention." *United States* v. *Hare*, 873 F.2d 796, 801 (5th Cir. 1989). *See also United States* v. *Ojeda Rios*, 846 F.2d 167, 169 (2d Cir. 1988) (per curiam).

Mr. Rodriguez's case is illustrative. Under the Government's position, the Government could justify his detention with the *same* showing after six months of detention as after six years (he won his case after seven). Due process does not permit that result.

The Ninth Circuit's procedures do not, as Respondents suggest, "count[] twice" detention length. Reply 23. Respondents conflate the availability of periodic hearings with the *showing* that the Government must make at the hearing. Unless immigration judges consider detention length when assessing the Government's justification for additional detention, the Government could justify prolonged terms of detention based only on the same initial showing it made at the first bond hearing.

That runs counter to *Zadvydas* and cannot be the law.

CONCLUSION

For these reasons and those in Respondents' Brief, the Court can affirm the decision below on statutory grounds and under the Constitution.

Respectfully submitted,

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In the Supreme Court of the United States

DAVID JENNINGS, ET AL., PETITIONERS

v.

ALEJANDRO RODRIGUEZ, ET AL.,
INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL REPLY BRIEF FOR THE PETITIONERS

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The Due Process Clause does not mandate the rigid, one-size-fits-all rule respondents advocate. Indeed, an inflexible six-month mandate that is blind to the wide variation in the statutory contexts here—and blind to the countless reasons why removal proceedings may be longer or shorter for a particular alien—is contrary to the fundamental notion that "[t]he constitutional sufficiency of procedures provided in any situation, of course, varies with the circumstances." *Landon* v. *Plasencia*, 459 U.S. 21, 34 (1982). A rigid yardstick would be particularly inappropriate for measuring the constitutionality of detention that is incident to removal proceedings, because the constitutionality of ongoing detention must be determined with reference to the reasons why the proceedings themselves remain ongoing. As this Court recognized in the context of the

Speedy Trial Clause, a court "cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate," *Barker* v. *Wingo*, 407 U.S. 514, 521 (1972), and a rigid six-month deadline "would require this Court to engage in legislative or rulemaking activity," *id.* at 523. See *Plasencia*, 459 U.S. at 34-35.

Respondents assert (Supp. Br. 12) that, "[o]utside the national security context, this Court has never authorized civil detention beyond six months without an individual hearing." But this Court has upheld detention beyond six months outside that context, including in *Demore* v. *Kim*, 538 U.S. 510 (2003), which forecloses respondents' position as to 8 U.S.C. 1226(c). This Court's decisions also foreclose such a mandate for aliens seeking initial admission and detained under 8 U.S.C. 1225(b). "This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application." *Plasencia*, 459 U.S. at 32. And aliens detained under that provision are provided significant process. In particular, arriving aliens who seek asylum or claim a fear of persecution or torture have credible-fear screening, removal proceedings before an immigration judge (IJ), appellate review, and individualized consideration for release on parole if the alien demonstrates he is not a flight risk or danger. Whatever due process might require, this framework is more than sufficient—and in all events, there is no basis for a rigid six-month mandate.

This Court therefore should reverse the judgment of the court of appeals and remand with instructions to enter judgment in the government's favor. The only common question holding this class action together

was whether the government must provide bond hearings to all class members at the six-month mark. The answer to that question is no.

I. The Constitution Does Not Require Bond Hearings Whenever Removal Proceedings (And Detention Incident Thereto Under Section 1225(b)) Last Six Months

A. The Constitution Does Not Require Bond Hearings After Six Months For Aliens Seeking Initial Admission

As the Ninth Circuit recognized, Section 1225(b) is "clearly" constitutional as applied to aliens seeking initial admission. Pet. App. 86a. "This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Plasencia*, 459 U.S. at 32. And aliens seeking admission who are detained under Section 1225(b) enjoy many protections in removal proceedings and may be released on parole. See Gov't Supp. Br. 7-17. There is accordingly no basis for upending fundamental tenets of national sovereignty and holding that, unless the government can complete removal proceedings in six months, *every* alien seeking admission has a presumptive constitutional entitlement to be released into the United States.

1. Respondents cannot distinguish this Court's precedents—and *a fortiori* cannot justify an arbitrary six-month cap in light of the extensive procedural protections available here. They contend (Supp. Br. 22) that *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), should be limited to national-security cases. But "[t]he distinction between an alien who has effected an entry into the United States and one who

has never entered runs throughout immigration law," *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001), not merely to rare cases involving sensitive national-security information.[1]

Respondents contend (Supp. Br. 20-21) that *Zadvydas* supports their proposed constitutional limit on detention to effectuate exclusion. But *Zadvydas* involved "aliens who were admitted to the United States but subsequently ordered removed" yet could not actually be removed. 533 U.S. at 682. As the Court explained, "[a]liens who have not yet gained initial admission to this country *would present a very different question.*" *Ibid.* (emphasis added).

Respondents contend (Supp. Br. 20) that they "seek procedures as to their detention rather than their admission." But a bond hearing for an alien seeking admission would relate to *both* detention *and* the alien's continued exclusion, because the IJ would decide whether to release the alien from detention *into the United States*. And *Mezei* rejected "both" the alien's "challenge to the procedures by which he was deemed excludable" and "his challenge to continued detention." *Zadvydas*, 533 U.S. at 694; see *Barrera-Echavarria* v. *Rison*, 44 F.3d 1441, 1449-1450 (9th Cir.) (en banc) (*Mezei*'s "holding necessarily included a determination that Mezei's *detention* was legal as well."), cert. denied, 516 U.S. 976 (1995). Indeed, on the detention question,

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[1] The injunction here also encompasses aliens who present national-security concerns. The class definition excludes aliens detained under two national-security statutes, 8 U.S.C. 1226a, 1537, but an alien who presents national-security concerns could be detained under Section 1225(b) or 1226(c). Pet. App. 139a-140a; see 8 U.S.C. 1182(a)(3), 1227(a)(4) (grounds of inadmissibility and deportability related to national security).

Mezei was unanimous. *E.g.*, 345 U.S. at 222 (Jackson, J., dissenting) ("Due process does not invest any alien with a right to enter the United States.").

2. Respondents focus on the subcategory of aliens arriving at a port of entry who lack valid documentation or seek to enter via fraud, and who would be removed via expedited removal (ER) except that they have been found to have a credible fear of persecution or torture. 8 C.F.R. 208.30(e)(5), 235.6(a)(1)(ii) and (iii); see 8 U.S.C. 1225(b)(1)(B)(ii). Respondents contend (Supp. Br. 23) that this subcategory is differently situated because they have been "screened in for full removal proceedings." But they remain inadmissible and have never been "admitted," which means "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. 1101(a)(13)(A). And Congress did not confer on them a protected liberty interest supporting their release. See *Kentucky Dep't of Corr.* v. *Thompson*, 490 U.S. 454, 460 (1989) ("[A]n individual claiming a protected interest must have a legitimate claim of entitlement to it."). To the contrary, Congress provided that an alien found to have a credible fear "*shall be detained* for further consideration" of his asylum claim, 8 U.S.C. 1225(b)(1)(B)(ii) (emphasis added), and may be released only through the Secretary of Homeland Security's *discretionary* parole authority under 8 U.S.C. 1182(d)(5). Cf. *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 756 (2005) ("[A] benefit is not a protected entitlement if government officials may grant or deny it in their discretion.").

Even if aliens in this subcategory nonetheless could claim some due process interest in seeking release into the United States, the existing framework provides

more than sufficient process. If their claim is deemed credible by an asylum officer (or by an IJ), regulations require that they be placed in IJ removal proceedings with the notice and opportunity to be heard that the *Mezei* dissenters viewed as sufficient; if the IJ denies their claim and orders them removed, they have access to appellate review; their detention is inherently temporary, not open-ended; and the government expedites proceedings to minimize that temporary detention. See Gov't Supp. Br. 22-24.

Furthermore, every studied subclass member remained in custody pursuant to an individualized determination that release on parole was unwarranted. See J.A. 91 (identifying studied subclass members based on a parole worksheet). The government's policy is to automatically consider parole for arriving aliens found to have a credible fear, and to release the alien if he establishes his identity, demonstrates that he is not a flight risk or danger, and there are no countervailing considerations. J.A. 48-50.[2] The policy calls for far more than "checking a box on a form, with no hearing, no record, and no appeal." Resps. Supp. Br. 27. It provides for notice to the alien, an interview, the opportunity to respond and present evidence, a custody de-

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[2] This policy remains in "full force and effect." Memorandum from John Kelly, Sec'y, Dep't of Homeland Sec., *Implementing the President's Border Security and Immigration Enforcement Improvements Policies* 10 (Feb. 20, 2017) (Kelly Mem.). The Secretary's memorandum reiterates that the burden "remains on the individual alien" and that U.S. Immigration and Customs Enforcement (ICE) "retains ultimate discretion whether it grants parole in a particular case." *Ibid.* It also states that the policy is subject to "further review and evaluation of the impact of operational changes" to implement Executive Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 30, 2017). Kelly Mem. 9.

termination by an officer who did not conduct the credible-fear screening, supervisory review, and further parole consideration based upon changed circumstances or new evidence. J.A. 48-50. That is ample procedure on the issue of release during proceedings. Cf. Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. Pa. L. Rev. 1267, 1278-1281 (1975). There is also good reason for Department of Homeland Security officials, not IJs, to make this determination: The Secretary has the "power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens." 8 U.S.C. 1103(a)(5); see 6 U.S.C. 202 (Secretary's responsibilities include "[p]reventing the entry of terrorists," "[s]ecuring the borders," and establishing rules governing parole).

Unlike studied class members overall (who were usually ordered removed), about two-thirds of studied aliens identified to be in the Section 1225(b) subclass obtained asylum or other relief. J.A. 98, 100 (42 of 66 completed cases). But the government has disputed that the statistics derived from this small sample are representative nationwide, see 12-56734 Gov't C.A. Br. 10, and in any event they would provide no basis for respondents' sweeping facial challenge. It is fully consistent with due process to temporarily detain an arriving alien during proceedings to determine whether he will be permitted to enter the United States, when he has failed to establish his identity or has failed to show that he will not be a flight risk or danger. See 8 U.S.C. 1182(d)(5); 8 C.F.R. 212.5(b); J.A. 48-50. As the Court put it "more than a century ago," removal proceedings "would be vain if those accused could not be held in custody pending the inquiry into their true

character." *Demore*, 538 U.S. at 523 (quoting *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896)).

3. In any event, even if in an extraordinary circumstance the Due Process Clause could potentially require an IJ bond hearing for an alien seeking initial admission—and possible release into the United States notwithstanding the contrary judgment of the Secretary—that would not remotely justify an across-the-board six-month limit. See pp. 1-2, *supra*. Indeed, constitutionalizing such an arbitrary deadline would not only contravene longstanding and fundamental principles of national sovereignty, but also would seriously impair the ability of Congress and the Executive to respond to a mass influx of aliens at the borders. See *Jean* v. *Nelson*, 472 U.S. 846, 848-849 (1985) (Haitian migrants); *Garcia-Mir* v. *Smith*, 766 F.2d 1478, 1484 (11th Cir. 1985) (per curiam) (Mariel Cubans), cert. denied, 475 U.S. 1022 (1986). It would create a powerful incentive for aliens seeking to enter to prolong their proceedings to achieve the six-month mark and potential release on bond. Flight for aliens in this subcategory is also particularly problematic, because an inadmissible arriving alien who absconds would unlawfully appropriate something similar to asylum itself: the ability to enter and be at large inside the United States.

B. The Constitution Does Not Require Bond Hearings After Six Months In Rare Cases Involving LPRs

A lawful permanent resident (LPR) returning from abroad generally has a protected due process interest in connection with his ability to reenter the United States. *Plasencia*, 459 U.S. at 34. Congress has robustly protected that interest, however, by providing that an LPR "shall not be regarded as seeking an admission"—and thus shall not be subject to detention under

Section 1225(b)(2)(A)—outside of six narrow circumstances. 8 U.S.C. 1101(a)(13)(C). The detention of an LPR under Section 1225(b) is thus, by definition, an exceptional circumstance. And even then, the application of Section 1101(a)(13)(C) will virtually always be constitutional: The exceptions in that provision involve aliens who have forfeited their LPR status and criminal aliens for whom constitutionality follows *a fortiori* from *Demore*. *Ibid.*; see Gov't Supp. Br. 25-26.

The appropriate mechanism for addressing an extraordinary case involving a returning LPR is thus an as-applied challenge focusing on its extraordinary facts. That possibility does not justify an across-the board limit governing every LPR, regardless of circumstances. And it would be manifestly improper to extend that rule to non-LPRs detained under Section 1225(b)(2)(A), a category respondents ignore—much less to aliens detained under Section 1225(b)(1)(B)(ii), which *never* applies to LPRs.

II. The Constitution Does Not Require Bond Hearings Whenever Removal Proceedings For Criminal Aliens (And Detention Incident Thereto Under Section 1226(c)) Last Six Months

A. This Court's Precedents Foreclose A Six-Month Rule

1. Respondents claim (Supp. Br. 12) that, "[o]utside the national security context, this Court has never authorized civil detention beyond six months without an individual hearing." But *Demore* and *Zadvydas* authorized just that. *Demore* upheld the detention of an LPR (Kim) who had already been detained pending removal proceedings for 197 days, who was subject to further detention following this Court's decision, whose removal hearing had not yet been held because he sought

a continuance, and who could later appeal. Gov't Br. 35-36 & n.11; see Am. Immigration Council et al. Amicus Br. 8 n.4 (asserting that Kim was detained ten more months). *Demore* thus squarely forecloses respondents' position.

Zadvydas also authorized detention for more than six months without an individual hearing, albeit after entry of a removal order. Even after the six-month "presumptively reasonable" period the Court identified as a statutory matter, there was no requirement of a hearing. 533 U.S. at 701. Rather, the government could continue to detain the alien unless and until he provided good reason to believe that there was no significant likelihood of removal in the reasonably foreseeable future. *Ibid.*; see also 8 U.S.C. 1231(a)(1)(C) (extending 90-day removal period "if the alien fails or refuses to make timely application in good faith" for travel documents "or conspires or acts to prevent the alien's removal").[3]

Furthermore, a rigid six-month mandate is fundamentally inconsistent with the flexibility inherent in due process. See pp. 1-2, *supra*. Even as a statutory matter, most circuits to address Section 1226(c) have rejected a six-month cap. See Gov't Supp. Br. 46. In the criminal context, this Court squarely rejected a six-month cap under the Speedy Trial Clause, holding that a court "cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate." *Barker*, 407 U.S. at 521. And lower courts have conducted a case-specific inquiry for as-applied challenges to continued pretrial detention, and have

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[3] *Mezei* upheld detention to effectuate exclusion for far longer than six months, albeit in the context of an alien seeking initial admission. See 345 U.S. at 208-216.

repeatedly upheld detention well beyond six months. See Gov't Supp. Br. 39-41 (collecting cases).

2. Respondents cannot justify departing so radically from the principles those decisions embody, especially given Congress's broad powers over immigration. Respondents assert (Supp. Br. 30) that subclass members "are detained for periods far longer than those the Court considered in *Demore*." But many (if not most) class members were released in periods that the Court could have reasonably foreseen for Kim himself or for others who seek relief, continuances, and possibly appeal. See J.A. 188 (44.3% of in-period class members released by 9 months, 67% by 12 months, and 84.1% by 16 months).[4]

Respondents again assert (Supp. Br. 33-35 & n.10) that this case does not involve "deportable" aliens and that many class members have "substantial defenses to removal." As the government previously explained (Merits Reply Br. 12-15), those asserted distinctions do not hold up. Virtually all of the studied subclass members with completed cases were found deportable or inadmissible. Gov't Supp. Br. 35-36. Moreover, Kim himself sought relief from removal and claimed that his request was a "substantial question not for purposes of delay." *Demore* Oral Arg. Tr. 42.

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[4] The government's expert did not agree that his methodology "significantly skew[ed] average detention lengths." Resps. Supp. Br. 31 n.9. He selected "in-period" aliens to correct for a selection bias and thus make the figures more representative, not less. J.A. 140-143. He was unable to continue tracking aliens who remained in detention at the end of the study period, but he stated that this had "no effect on the medians and very little effect on many of the other statistics" because such a small portion of the sample were still detained at that point. J.A. 172.

There is no merit to respondents' assertion that 74% of subclass members (Supp. Br. 34 n.10)—not 97%, as they previously claimed, Br. 20 n.5, 28—raise "substantial" defenses. The record shows that 70% of subclass members *filed* for relief from removal, J.A. 95-96, not that they were all "eligible" or had "substantial" claims for relief, as respondents claim (Supp. Br. 34 n.10). An alien may apply for relief even if he is ultimately found ineligible. 8 C.F.R. 1240.11(e). Although the record does not indicate how many were eligible, it shows that nearly two-thirds were denied. See Gov't Supp. Br. 42.[5]

Respondents again tout (Supp. Br. 36-37) monitoring programs to combat flight. But "monitoring mechanisms which can be employed as viable alternatives to detention" existed at the time of *Demore*. 538 U.S. at 555 n.10 (Souter, J., concurring in part and dissenting in part) (citation omitted). And respondents' figures are unrepresentative, because criminal aliens subject to mandatory detention are not included in such programs. Gov't Merits Reply Br. 16.

B. The Cases Respondents Rely On Are Inapposite

The cases respondents rely upon to support a rigid six-month test are clearly inapposite. First, it is immaterial that the Sixth Amendment guarantees a "trial by jury where imprisonment for more than six months is authorized." *Baldwin* v. *New York*, 399 U.S. 66, 69 (1970) (opinion of White, J.); *id.* at 74-76 (Black, J.,

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[5] The record similarly does not show that "[m]ore than half" "lawfully resided here for seven years, with at least five years as an LPR, and with no aggravated felony convictions." Resps. Supp. Br. 44. Those are the eligibility requirements for an LPR to obtain cancellation of removal, 8 U.S.C. 1229b(a), but the record does not indicate what portion were eligible.

concurring in the judgment). This case involves the Due Process Clause, not the Sixth Amendment, and the jury-trial rule is grounded in the definition of "petty offenses" dating back to "the late 18th century." *Id.* at 70-71 (opinion of White, J.). By contrast, respondents' six-month cap is entirely novel and foreclosed by *Demore*. A "petty offense" is also amenable to bright-line definition because imprisonment is a freestanding penalty. Detention incident to removal proceedings, by contrast, is not punitive, and its length is necessarily tied to the length of the removal proceedings themselves, which can vary considerably depending on many contingencies.

This case is also fundamentally different from the "certainly unusual" situations where this Court has imposed clear deadlines as a matter of due process. *Maryland* v. *Shatzer*, 559 U.S. 98, 110 (2010); see *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 55-57 (1991). *Shatzer* and *McLaughlin* involved periods that were so short that case-by-case adjudication was "impractical." *Shatzer*, 559 U.S. at 110 (14 days); see *McLaughlin*, 500 U.S. at 55-57 (48 hours). By contrast, as *Demore*, *Barker*, and the many cases sustaining pretrial criminal detention for longer than six months illustrate, case-by-case adjudication is properly tailored and workable here. Moreover, the State could largely control the timing of the custodial interrogation in *Shatzer*, 559 U.S. at 110, and the *Gerstein* hearing in *McLaughlin*, 500 U.S. at 56. By contrast, although the government expedites proceedings for detained aliens to minimize their duration, the duration varies largely due to the alien's own litigation choices to seek relief and otherwise take advantage of the afforded procedures.

Finally, *McNeil* v. *Director*, 407 U.S. 245 (1972), does not support constitutionalizing a six-month cap. That case involved a freestanding regime for the indefinite commitment of the mentally ill, and is inapposite for the same reasons as *Foucha* v. *Louisiana*, 504 U.S. 71 (1992), and *Addington* v. *Texas*, 441 U.S. 418 (1979). See Gov't Supp. Br. 33-35. Also, in *McNeil*, the Court identified six months as "a useful benchmark" because the underlying statute "limit[ed] the observation period to a maximum of six months," subject to renewal, suggesting an "initial legislative judgment" about an appropriate period. 407 U.S. at 250. In Section 1226(c), by contrast, Congress made a different legislative judgment: "justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers," Congress mandated detention of covered criminal aliens until removal proceedings are completed. *Demore*, 538 U.S. at 513.

C. A Six-Month Rule Would Be Vastly Overbroad And Would Cause Serious Practical Problems

1. Respondents contend (Supp. Br. 44) that the Court should make six months the arbitrary outer limit because it would be unrealistic for "all of these individuals" to file habeas cases. But that begs the question by assuming that "all of these individuals" would have a viable claim at or soon after the six-month mark. That assumption is unfounded. Under *Demore*, Section 1226(c) is constitutional in virtually all of its applications, including when removal proceedings last beyond the six-month mark. Conversely, a six-month mandate would be arbitrary and radically overbroad. Indeed, it would cause the very problems of flight and recidivism that Congress enacted Section

1226(c) to prevent—notwithstanding that, under the proper case-specific due process analysis that takes into account the reasons for the duration of the proceedings, detention would be constitutional in the vast majority of cases. See Gov't Supp. Br. 42-45.

A fixed time limit would also create a powerful incentive for criminal aliens to prolong their removal proceedings in the hope of obtaining the release that Congress foreclosed. Respondents contend (Supp. Br. 47) that "[n]o evidence supports th[e] claim" that a six-month rule encourages criminal aliens to prolong their proceedings. But there is no record evidence on this point either way, and the incentive is clear: The prospects of being granted bond at six months (more than two-thirds) are substantially higher than the prospects of obtaining relief via litigation (about one third). Gov't Supp. Br. 43; cf. *Zadvydas*, 533 U.S. at 713 (Kennedy, J., dissenting) ("[C]ourt ordered release cannot help but encourage dilatory and obstructive tactics.").

2. The government agrees that detention must always "remain[] reasonably related to its purpose." Resps. Supp. Br. 48. But nothing about the six-month mark establishes that there has been unreasonable government delay or that Congress's categorical judgment of flight risk and dangerousness, which the Court upheld in *Demore*, has ceased to be valid. See 538 U.S. at 531. To the contrary, the government's interests in preventing flight and recidivism will virtually always justify detention of a criminal alien for the full duration of his removal proceedings. Gov't Supp. Br. 31-35. The government expedites removal proceedings for detained aliens to minimize their duration. *Id.* at 14-15. And the record indicates that sub-

stantial periods elapsed for class members not because of government-created delay, but because removable criminal aliens chose to seek continuances, relief from removal, and appellate review, notwithstanding that detention was mandatory when they did so. Those choices may entail "difficult judgments," but the Court in *Demore* made clear that continued detention of those who make them is not unconstitutional. 538 U.S. at 530 n.14 (citation omitted).

Choices to seek continuances, relief from removal, appellate review by the Board of Immigration Appeals (BIA), or to petition for judicial review (and a stay of removal) necessarily extend proceedings—and thus necessarily extend the detention needed to prevent criminal aliens from fleeing or committing further crimes in the interim. Gov't. Supp. Br. 41-42. In the end, moreover, virtually all criminal aliens in the class were found removable and about two-thirds were ordered removed. *Id.* at 42. And if the alien lost before the IJ, he was exceedingly unlikely to prevail before the BIA or a court of appeals. *Ibid.* That further weakens respondents' suggestion (Supp. Br. 31, 48) that the Constitution requires a bond hearing when detention is extended because the alien has chosen to appeal. Congress also had ample support for concluding that, if such criminal aliens are released, flight and recidivism will be significant concerns. Gov't Supp. Br. 42-45. The purpose of mandatory detention—to prevent flight and recidivism by criminal aliens—would be thwarted if a criminal alien could unilaterally ensure that his removal proceedings last six months, and then be rewarded with the very real possibility of release that Congress enacted Section 1226(c) to prevent.

3. Section 1226(c) unambiguously prohibits bond hearings and general due process principles and *Demore* foreclose a flat six-month rule. To be sure, outlier cases could arise in which the proceedings, and accompanying detention, become unjustifiably prolonged. In that event, an as-applied challenge to continued detention could be brought in an individual habeas action. This Court could, however, provide some guideposts for federal courts to readily identify and address outlier cases in as-applied challenges.

First, in some cases, the length of time could itself indicate that closer scrutiny is warranted. The record indicates that a detained case is a statistical outlier (the longest decile in this class) if the IJ stage has lasted about 14 months, or if the IJ and BIA stage together have lasted about 20 months. Gov't Merits Reply Br. 21. Such passage of time would not necessarily indicate that mandatory detention has become unconstitutional, but could fairly prompt an occasion for review of the reasons why proceedings remain ongoing.

Second, in assessing whether there is a legitimate basis for the proceedings and resulting detention to remain ongoing, a court could look by analogy to the sorts of reasons why periods of time are excluded under the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.* That Act starts with a baseline of 70 days for a trial to commence, 18 U.S.C. 3161(c)(1), then excludes various periods, 18 U.S.C. 3161(h). Although some exclusions have no analogy in removal proceedings (and some aspects of removal proceedings have no analogy in the Speedy Trial Act), for many the analogy is clear. For example, a habeas court entertaining an as-applied challenge to detention under Section 1226(c) could generally exclude from the calculus: (1) any peri-

od resulting from continuances, 18 U.S.C. 3161(h)(7);[6] (2) any period resulting from the unavailability of an essential witness, 18 U.S.C. 3161(h)(3)(A); (3) any period "resulting from other proceedings concerning the defendant," 18 U.S.C. 3161(h)(1), such as interviews or a background check to support an application for discretionary or other relief from removal; (4) any period needed for prompt disposition of a motion, 18 U.S.C. 3161(h)(1)(D); (5) "delay reasonably attributable to any period, not to exceed thirty days, during which" a motion "is actually under advisement by the [IJ]," 18 U.S.C. 3161(h)(1)(H); and (6) delay resulting from an appeal to the BIA, 18 U.S.C. 3161(h)(1)(C) (excluding delay from interlocutory appeals).[7]

This approach would provide an administrable basis for confirming in most cases that removal proceedings remain ongoing for good reason, and thus that mandatory detention to prevent flight or recidivism remains justified by those immigration purposes. In particular, this approach would account for the reasonable impact of many significant litigation choices by detained criminal aliens. Conversely, under this approach, if the duration of removal proceedings has extended substantially beyond what could reasonably be expected for similar cases, a court could assess more closely the reasons why proceedings have not yet been completed and whether they have been unreasonably or pointless-

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[6] Continuances are granted only for good cause, 8 C.F.R. 1003.29, and ICE policy is to request them in detained cases only when absolutely necessary, Gov't Supp. Br. 14.

[7] Courts should also exclude the time that elapses if the alien files a petition for review of a final order of removal from the BIA, especially if the alien obtains a stay of removal rather than litigating from abroad. See Gov't Supp. Br. 13.

ly delayed—including whether the alien has sought to expedite proceedings when they have become delayed. Cf. *Barker*, 407 U.S. at 528. In all events, however, the Constitution does not impose the flat six-month mandate respondents advocate.

III. The Constitution Does Not Require The Government To Conduct Bond Hearings Automatically Every Six Months, To Bear The Burden Of Proof (Much Less By Clear-And-Convincing Evidence), Or To Revise The Bond Factors

A. The Constitution Does Not Require Automatic Periodic Hearings For Aliens Denied Bond Or Who Fail To Post Bond

As set forth above, the Constitution does not require the government to provide bond hearings whenever removal proceedings—and incident detention of an alien seeking admission under Section 1225(b) or a criminal alien under Section 1226(c)—last six months. It follows *a fortiori* that the Constitution does not require bond hearings every six months for aliens detained under Section 1226(a), who have already had an individualized bond hearing and can obtain another if circumstances change materially. 8 C.F.R. 236.1(d)(1), 1003.19(e), 1236.1(d)(1).

Respondents contend that this scheme is facially unconstitutional and that the government must conduct bond hearings every six months, automatically, even when an alien detained under Section 1226(a) has not asked for a new hearing or circumstances have not materially changed. In urging that dramatic revision of longstanding procedures, they cite no case that has ever mandated automatic periodic hearings. Instead, they rely (Supp. Br. 56) on *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). But that case reaffirms that "due pro-

cess is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 334. Respondents also assert that a "confinement that is in fact indeterminate cannot rest on procedures designed to authorize a brief period of observation." Resps. Supp. Br. 56 (quoting *McNeil*, 407 U.S. at 249). But the confinement here is not indefinite; it is inherently temporary, and the government expedites detained cases to hasten their inevitable end. Moreover, existing procedures under Section 1226(a) are designed to address detention until the decision is made "whether the alien is to be removed," 8 U.S.C. 1226(a), and allow for subsequent bond hearings in the meantime when circumstances have materially changed. Conversely, without a material change, a subsequent hearing would be wastefully duplicative and needlessly distract IJs from their primary mission of deciding removal cases. Cf. *Goldberg* v. *Kelly*, 397 U.S. 254, 267 n.14 (1970) ("Due process does not, of course, require two hearings.").

B. The Constitution Does Not Require The Government To Bear The Burden Of Proof—Much Less By Clear-And-Convincing Evidence

1. Respondents contend (Supp. Br. 50) that, "[i]n every context where the Court has considered the constitutionality of civil detention or comparably severe deprivations of individual liberty, the Government has borne the burden of proof." Not so. In every case in which it has arisen, this Court has authorized civil detention where release was either foreclosed on a categorical basis or the burden was on the alien. *Demore*, 538 U.S. at 531; *Zadvydas*, 533 U.S. at 701; *Reno* v. *Flores*, 507 U.S. 292, 313 (1993) (the government may rely on "reasonable presumptions and generic rules"); *Carlson* v. *Landon*, 342 U.S. 524, 541-543

(1952). Indeed, when addressing potentially indefinite detention in *Zadvydas*, the Court itself placed the burden on the alien to justify release. See 533 U.S. at 701. Respondents also fail to explain why it is constitutional for longstanding regulations to place the burden on an alien in an initial bond hearing under Section 1226(a), 8 C.F.R. 236.1(c)(8), but later unconstitutional if bond is denied (or the alien fails to post bond) and detention lasts six months.

2. Relying solely on *Addington*, respondents briefly argue (Supp. Br. 51-52) that the Constitution mandates that the government bear a clear-and-convincing burden, in all cases, at the six-month mark. But respondents have no response to the many reasons why *Addington* is inapposite. *E.g.*, Gov't Br. 53; Gov't Merits Reply Br. 9-10; Gov't Supp. Br. 33-35, 50-51. More fundamentally, in the history of U.S. immigration law, the government has never borne the burden to justify interim detention by clear-and-convincing evidence—yet this Court has upheld such interim detention in every case in which it has arisen.[8]

Constitutionalizing a clear-and-convincing standard to justify interim detention of an alien seeking admission would permanently impair the government's ability to defend the Nation's borders. It would mean that aliens arriving on our doorstep—about whom the government may have limited information as to their identity, flight risk, or dangerousness—would have a presumptive entitlement to enter the United States, even on the basis of an information asymmetry. That

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[8] This Court has also upheld the Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.*, which allows detention when flight risk is established by a preponderance, 18 U.S.C. 3142(c). *United States* v. *Salerno*, 481 U.S. 739, 741 (1987).

would leave an "unprotected spot in the Nation's armor," *Zadvydas*, 533 U.S. at 695-696 (citation omitted), that Congress could not close.

For criminal aliens detained under Section 1226(c), such a constitutional mandate would permanently increase the proportion of criminal aliens who are released and, experience has shown, will reoffend or flee "in large numbers." *Demore*, 538 U.S. at 513. The record suggests that most criminal aliens are granted bond under respondents' standard, J.A. 528, flouting Congress's judgment that bond should *never* occur. And for aliens detained under Section 1226(a) after an individualized determination of flight risk or danger, it would permanently increase the likelihood of flight or danger that prompted an IJ to deny bond (or set a high bond) the first time, when the burden was on the alien. See Gov't Supp. Br. 51-54.

C. If The Constitution Requires A Bond Hearing, It Does Not Further Require The Government To Make Duration A Bond Factor

Respondents contend (Supp. Br. 57) that the Constitution mandates that the duration of detention be counted twice, both when deciding whether to order a bond hearing and again in the bond hearing itself. But respondents identify no decision supporting that approach and no context where duration is a bond factor.

Respondents assert (Supp. Br. 57) that, "[u]nless [IJs] consider detention length when assessing the Government's justification for additional detention, the Government could justify prolonged terms of detention based only on the same initial showing it made at the first bond hearing." But that concern is misplaced. The heart of this suit is respondents' effort to force the government to provide a "first bond hearing" for aliens

seeking admission and criminal aliens detained under Sections 1225(b) and 1226(c). If a bond hearing were constitutionally required, the remedy would be to provide the process that was lacking: "an individualized determination" by an IJ "as to [the alien's] risk of flight and dangerousness." *Demore*, 538 U.S. at 532 (Kennedy, J., concurring). There is no basis for making duration a bond factor as well. The pretrial detention cases respondents rely on (Supp. Br. 57) are also inapposite, because they do not address the factors to be considered in a bond hearing. *E.g.*, *United States* v. *Hare*, 873 F.2d 796, 801 (5th Cir. 1989).

* * * * *

For the foregoing reasons and those stated in our prior briefs, the judgment of the court of appeals should be reversed.

Respectfully submitted.

EDWIN S. KNEEDLER
*Deputy Solicitor General**

FEBRUARY 2017

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* The Acting Solicitor General is recused in this case.

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Supreme Court of the United States

DAVID JENNINGS, *et al.*,

Petitioners,

v.

ALEJANDRO RODRIGUEZ, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTRODUCTION

Prior to the injunction, the Government incarcerated thousands of people for years pending completion of removal proceedings without providing them custody hearings before neutral decision makers. Many of these individuals presented no flight risk or danger requiring detention, rendering their extended imprisonment pointless. Many of them also won their deportation cases. Some who lost did so only because they had to litigate their cases while detained. Others abandoned meritorious cases because they could not endure prolonged incarceration.

This regime, documented extensively below, did not protect individual liberty as required by the Due Process Clause and this Court's precedents concerning closely analogous forms of civil detention. This Court's immigration detention cases do not support the wholesale abandonment of basic due process requirements, including a custody hearing when detention becomes prolonged.

The Arriving Subclass (1225(b)) is entitled to that basic due process protection because, unlike those turned away at the border, they have passed the initial screening that Congress provided and are entitled by statute to establish their right of entry in full removal proceedings. Because the Government may not expel them unless and until it establishes their removability at the completion of their cases, it must afford them some minimal process to prevent prolonged arbitrary detention.

The Mandatory Subclass (1226(c)) warrants the same protection because they have not lost the right to reside here and, unlike the detainee in *Demore* v.

Kim, 538 U.S. 510 (2003), have challenged their incarceration without a hearing because it is prolonged.

Contrary to Petitioners' claims, the relief ordered below is modest and tailored to the immigration context. It does not require the release of any detainee. It requires only that a neutral decision maker conduct a fair hearing after six months of incarceration—the time limit for punishment without jury trial in criminal cases—to determine whether continued detention is needed to serve a valid purpose. Due process requires such hearings *within days* for people charged with crimes.

Placing the burden on the Government to show an individual need for continued incarceration is appropriate when detention becomes prolonged, *i.e.*, after six months of detention based only on the statute's categorical presumption. Immigration Judges (IJs) can then consider the likelihood of success on the merits, allegations of dilatory conduct, and other factors in assessing whether further incarceration is warranted to prevent flight or danger.

Petitioners assert that detainees can avoid prolonged detention "simply by returning to their native lands." P.Supp. 3. That alternative is unreasonable for the Arriving Subclass members fleeing persecution, nearly two-thirds of whom eventually satisfied Congress's standards for asylum even before the injunction. It is equally unreasonable for Mandatory Subclass members, nearly 40% of whom won their cases, often because they were brought here as children and have extensive family ties in this country. Petitioners point to other purported safeguards, like requests for parole or expedition, but the record establishes that these long-

available options have not prevented prolonged, purposeless detention.

Petitioners do not dispute that the risk of flight is often negligible when IJs order intensive supervision methods. According to Petitioners' own witness, appearance rates stand "at or near 100%." Nor do Petitioners cite the record to support their security concerns. Petitioners instead rely on extra-record sources and their own data analysis (not even that of their expert). Their new and untested representations are rife with error. They cite the wrong data, make calculations using materially-incomplete datasets, rely on policies that have not been implemented, and make other mistakes that invite error, just as in *Demore*.

Thus, although Petitioners claim the injunction places our nation at risk, the record below shows nothing of the sort. For over four years, the injunction has provided modest process for people not detained as national security threats without harming our interests. "Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint . . . ." *Boumediene* v. *Bush*, 553 U.S. 723, 797 (2008).

ARGUMENT

I. PROLONGED DETENTION UNDER SECTIONS 1225(b)(1)(B)(ii) AND 1225(b)(2)(A) WITHOUT AN INDIVIDUALIZED CUSTODY HEARING VIOLATES THE DUE PROCESS CLAUSE.

Petitioners now concede the Arriving Subclass is narrower than they previously argued. It includes only two groups of individuals, both of whom have satisfied the statutory requirements for full removal

proceedings. P.Supp. 10. Petitioners do not dispute that nearly two-thirds of these individuals win their cases. J.A. 125, tbl.38.

1. Nevertheless, Petitioners assert that providing hearings to such individuals after six months of detention has left our nation at risk. P.Supp. 24. The record belies this claim. The injunction has operated for over four years, yet the record contains no evidence that the release of Subclass members found to pose no flight risk or danger presents serious safety concerns.

Petitioners also ignore that, prior to the injunction, they already released some Arriving Subclass members on parole, P.Supp. 10-12, and released a far larger number of individuals—those who crossed the border without inspection—through bond hearings. R.Supp. at 5. The injunction requires only that those who present themselves at the border and are detained for six months receive a hearing before a neutral decision maker.[1]

No other system of civil detention permits the jailing authority to incarcerate people for months or years without hearings. Petitioners do not dispute this. They argue instead that detainees apprehended at the border have no right to liberty because they are "obviously inadmissible," P.Supp. 17, but that is not true of Arriving Subclass members. Most have shown a "significant possibility" of establishing eligibility for asylum, which will result in admission. R.Supp. 3-4. Others are lawful permanent residents (LPRs) or others found not "clearly and beyond a

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[1] Contrary to Petitioners' claim, the detention of individuals screened in for full removal proceedings is governed by Section 1226(a), which places ultimate authority for interim release in the Attorney General, not the Secretary. Resp. 42-46.

doubt entitled to be admitted," but who still may be admissible. 8 U.S.C. 1225(b)(2)(A). All have a right to freedom from prolonged arbitrary detention while lawfully pursuing procedures Congress established to determine their admissibility. *See* R.Supp. 19-24.

2. Petitioners cite immigration cases from inapposite contexts to support their position that Subclass members have no right to liberty, P.Supp. 19-20, but, with the exception of *Mezei*, none addresses detention, let alone prolonged detention. Petitioners rely on *Kleindienst* v. *Mandel*, 408 U.S. 753, 756-59 (1972), and *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 275 (1990), both of which involved individuals physically outside the United States when alleged constitutional violations occurred. 494 U.S. at 264 ("[I]f there were a constitutional violation, it occurred solely in Mexico."). Petitioners contend Arriving Subclass members are, "in contemplation of law," entirely abroad, P.Supp. 20, but they cite no case adopting that view for people screened in for full removal proceedings, rather than for people denied visas, arrested abroad, or already ordered removed.

Galvan v. *Press*, 347 U.S. 522 (1954), and *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 581 (1952), address Congress's substantive power to create "[p]olicies pertaining to the entry of aliens and their right to remain." *Galvan*, 347 U.S. at 531; *Harisiades*, 342 U.S. at 587-89. They do not address the power to *detain* pending removal proceedings, let alone what procedural rights apply to prolonged detention. *Galvan* expressly recognized that "[i]n the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process." 347 U.S. at 531.

Similarly, *Ekiu* v. *United States*, 142 U.S. 651 (1892), established the uncontroversial proposition that the Government can deny admission to non-citizens. But this case is not about admission. *Ekiu*'s holding that there are no due process constraints on immigration enforcement was overruled in *Yamataya* v. *Fisher*, 189 U.S. 86, 100-01 (1903). *See* Amicus Br. of Professors of Constitutional, Immigration and Administrative Law 10.

Petitioners also cite *Landon* v. *Plasencia*, 459 U.S. 21 (1982), but it undermines their argument. *Plasencia* establishes that what process is due turns on the interests at stake, not whether an individual is apprehended at the border while seeking admission. *Id.* at 34. Here, Class members' interest is in avoiding prolonged arbitrary detention, not securing initial admission.

The only case Petitioners cite upholding detention is *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953). Mezei was ordered excluded as a national security threat, however, and remained detained only because no country would accept him. *See* R.Supp. 20-24. This case involves individuals who have *not* been ordered removed, who are *not* national security threats, and who seek temporary release only if an IJ finds no flight risk or danger. Moreover, *Mezei* predates *Zadvydas*'s recognition of the distinction between the right to live "at large" in this country and the right to release from imprisonment under conditions of supervision. *Zadvydas* v. *Davis*, 533 U.S. 678, 696 (2001). Respondents seek process only with respect to the latter.

3. Petitioners make separate arguments against custody hearings for Arriving Subclass members who are LPRs returning from brief travel abroad, but those arguments are foreclosed by *Plasencia*, 459 U.S.

at 34. Petitioners claim such individuals are "unusual," P.Supp. 24, but they are routinely detained based on prior convictions or for alleged unlawful conduct. *See* Amicus Br. of Detained Legal Service Providers 8-12 (documenting numerous cases). The record lacks more examples only because Petitioners failed to contest their existence in district court. Resp. 32.

Petitioners next assert that prolonged detention of returning LPRs without hearings would "virtually always be constitutional." P.Supp. 25-26. Petitioners describe a hypothetical LPR accused of smuggling drugs across the border as having no right to a custody hearing, but *Plasencia* involved analogous allegations and nonetheless required hearings that afforded due process even for admission, over which Congress has broader powers than detention. 459 U.S. at 34. Nor does *Demore* suggest otherwise. Even for brief detentions, *Demore* upheld mandatory detention for those who "became 'deportable' . . . only following criminal convictions that were secured following full procedural protections." 538 U.S. at 525 n.9. It does not support mandatory detention based on mere accusations.[2]

4. Petitioners also maintain the existing system provides sufficient process. P.Supp. 7-11. Safeguards at removal proceedings, however, address only whether Class members can live here permanently, not the justification for prolonged detention pending proceedings. Parole review also is insufficient, because it involves no hearing, no record, and no

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[2] The parties agree returning LPRs with *convictions* triggering mandatory detention under Section 1226(c) have no greater rights than LPRs who did not travel; their rights are addressed in Point II.

appeal, and leaves the decision entirely in the jailer's hands. R.Supp. 24-27. *See also* Supp. Amicus Br. of Human Rights First 12-36.

Petitioners claim Class members can "simply return[] home." P.Supp. 13. That is not an option for asylum seekers fleeing persecution. And it is a misnomer for LPRs, many of whom have lived here since their youth. J.A. 556-58 (almost half of Class members arrived as children or young adults, over 60% have U.S. citizen children). Mr. Rodriguez was brought here as an infant. Resp. 5. This is his home.

Petitioners cite an extra-record "policy" ostensibly facilitating litigation from abroad by those seeking judicial review of removal orders. But only one-fifth of the Class would be even theoretically eligible for that option. J.A. 123. All other Class members, whose cases remain pending before the immigration court or BIA, would forfeit their claims by departing. Petitioners also present no record evidence that this policy actually works, and available extra-record material suggests it does not.[3]

Similarly, Petitioners cite only extra-record material to show they expedite detention cases. P.Supp. 14. The Ninth Circuit denied Petitioners' request to judicially notice such material. *See* Ninth Circuit Dkt. 133 at 3-4 (No. 13-56706). The record shows such policies are routinely ignored and fail to prevent lengthy detentions. J.A. 92, tbl.20 (Mandatory Subclass average 427 days); J.A. 97, tbl.27 (Arriving Subclass average 346 days). The

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[3] *See* Tianyin Luo & Sean L. McMahon, *Victory Denied: After Winning on Appeal, an Inadequate Return Policy Leaves Immigrants Stranded Abroad*, 19 Bender's Immigr. Bull. 1061 (2014). Respondents cite this material only to illustrate why the Court should not rely on Petitioners' extra-record evidence.

Government regularly seeks adjournments, extensions, and stays in detained cases, and has taken months to process applications. *See, e.g.*, Resp. 49 (Government sought three stays in Rodriguez's case); J.A. 32-33 (Perez-Ruelas detained for over a year while DHS processed I-130 petition); J.A. 216-17 (eight months additional detention while DHS processed application to maintain LPR status, ignoring repeated requests for expedited processing).

Petitioners say detainees can *request* expedition, P.Supp. 46, but ignore that IJs need not *grant* those requests. The record shows these requests can be and are denied. Resp. 24 (IJ continued case for four months and denied motion to shorten). Comparative data analysis and Petitioners' own expert testimony establish that crowded dockets drive adjournment lengths. Resp. 24. Therefore, requests to expedite rarely serve to shorten detention.

II. PROLONGED DETENTION UNDER SECTION 1226(c) WITHOUT INDIVIDUALIZED CUSTODY HEARINGS VIOLATES THE DUE PROCESS CLAUSE.

Petitioners claim authority to incarcerate Mandatory Subclass members for years without custody hearings to determine flight risk or danger. This would constitute a dramatic expansion of Executive power at the expense of due process. The Court has always required that prolonged civil confinement remain reasonable in relation to a valid purpose, not just that it serve any purported one. *Compare Zadvydas*, 533 U.S. at 690, *with* P.Supp. 30. For that reason, due process requires individualized hearings to demonstrate a need for detention whenever it becomes prolonged. R.Supp. 16-17.

1. Petitioners contend the Court has repeatedly upheld detention incident to removal proceedings, P.Supp. 27, but they conflate detention with detention *without hearings*. Respondents do not dispute that many Subclass members can be detained for prolonged periods. However, none of Petitioners' cases authorize *prolonged* detention *without hearings*. R.Supp. 32-33 (discussing *Reno* v. *Flores*, 507 U.S. 292 (1993) and *Carlson* v. *Landon*, 342 U.S. 524 (1952)).

2. Petitioners insist *Demore* already authorizes prolonged mandatory detention, P.Supp. 28, but that issue was never presented to the Court. Mr. Kim challenged even a "brief period" of detention without custody hearings. *Demore*, 538 U.S. at 523. He did not raise, and the Court did not address, whether mandatory detention becomes unconstitutional when prolonged. *Cf. Brecht* v. *Abrahamson*, 507 U.S. 619, 631 (1993) (issue not "squarely addressed" by prior decision remains "free" to be addressed "on the merits").[4]

3. *Zadvydas*, on which *Demore* relied, applied the principle that prolonged detention requires individualized justification in the immigration context. *Zadvydas* presumed the validity of mandatory detention for 90 days when a detainee loses his case, but required greater justification after six months. 533 U.S. at 700-01.

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[4] Petitioners repeatedly suggest this case presents a "facial" challenge to detention under 1226(c). P.Supp. 4, 26. It does not. Respondents challenge the constitutionality of 1226(c) as applied to detainees held beyond six months. Respondents do not dispute its constitutionality in the vast majority of cases because they involve brief detentions.

Zadvydas required *release*, not merely a hearing, when removal was not significantly likely to occur in the reasonably foreseeable future because detention in those circumstances was no longer reasonable in relation to its purpose. *Id.* at 699-700. The Government implemented *Zadvydas* by adopting regulations to review detentions beyond six months, just as the lower courts ordered here. 8 C.F.R. 241.4(k)(1)(ii), (k)(2)(i).[5] As Judge Pryor explained, there is

> very little to distinguish the Supreme Court's approach in *Zadvydas* from the bright-line approach I endorse here. Both approaches permit the government to detain an alien for a period of six months and both also permit an alien's continued detention after the expiration of that period if the government can make the requisite showing justifying continued detention.

Sopo v. *U.S. Att'y Gen.*, 825 F.3d 1199, 1224 n.3 (11th Cir. 2016) (Pryor, J., dissenting).

4. Although Petitioners previously conceded that longer detentions require greater judicial scrutiny, Br. 47, they now take the counterintuitive position that the need for process *diminishes* when detention becomes prolonged, P.Supp. 31-33, even though the opposite rule applies in all other detention contexts. R.Supp. 16-18. Their arguments rest on speculation refuted by the record.

a. Petitioners contend the Government's interests increase as proceedings advance because detainees

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[5] The implementing regulations place decision-making authority at DHS Headquarters. 8 C.F.R. 241.4(c)(2). That is understandable because the analysis requires weighing another nation's interest in repatriation. 8 C.F.R. 241.13. Here, the question is flight risk or danger, which IJs regularly consider.

have greater incentives to flee as cases near completion. That may be true in some cases, but it is plainly false in others, particularly where detainees are likely to win—as when they become eligible for relief after winning on appeal, J.A. 258-60, or remain detained while awaiting likely approval of a petition or relief application. J.A. 32-33. Mr. Rodriguez won after three-and-a-half years in detention (and seven years of litigation). Resp. 6. Another detainee won after 28 months. J.A. 83, tbl.15.

In cases like these, the Government's interest diminishes as detention becomes prolonged. Petitioners' one-size-fits-all approach routinely results in months and sometimes years of pointless detention for individuals who pose no flight risk or danger. It fails to allow any individualized consideration of whether a Class member's prolonged detention remains reasonable. *See generally* J.A. 209-36.[6]

Petitioners' extra-record assertion, which their expert never made, that Class members "almost never prevail[]" on either appeals from the IJ to the BIA or petitions for review from the BIA to the Ninth Circuit, P.Supp. 16-17, misinterprets two sets of data. Petitioners cite data about BIA appeals *from custody hearings*, not appeals from IJ removal orders. J.A.

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[6] *Amici* 29 U.S. Representatives incorrectly assert cases rarely last beyond six months unless they involve appeals. Two thirds of Class members' cases had no appeal. J.A. 75, tbl.5. The average detention in these cases lasted 11 months. J.A. 76, tbl.6. *Amici*'s claim that extremely long detentions occur only during federal court review is also wrong. *E.g.*, *Nadarajah* v. *Gonzales*, 443 F.3d 1069, 1071 (9th Cir. 2006) (nearly five-year detention during immigration court proceedings); *Diop* v. *ICE/Homeland Sec.*, 656 F.3d 221, 223-26 (3d Cir. 2011) (nearly three-year detention).

526 (data on the "outcome of 1,680 bond hearings"). In fact, Class members win approximately 25% of removal order appeals to the BIA—five times higher than Petitioners suggested, and nearly three times higher than a litigant's likelihood of winning an appeal in federal court. *See* Statistical Tables for the Federal Courts, tbl.B-5 (June 30, 2016), http://www.uscourts.gov/sites/default/files/data_tables/stfj_b5_630.2016.pdf.

Petitioners likewise claim "only six" Class members won petitions for review at the Ninth Circuit, but their data only considers completed cases from a time when nearly 40% of all cases remained pending. J.A. 75, 84. This selection bias underrepresents those who win, because a granted petition is typically remanded for further proceedings (as in Mr. Rodriguez's case), whereas detainees who lose typically have no further proceedings. The data confirms this flaw in Petitioners' analysis. 33% of Class members with then-pending petitions went on to win their cases, a substantially higher rate than Petitioners report.[7]

Petitioners also contend prolonged detention is constitutional whenever it results from a continuance requested by a detainee because, in *Demore*, Mr. Kim sought a continuance. P.Supp. 31-32. But *Demore* mentioned that fact only to reject the argument that mandatory detention impermissibly deters appeals. 538 U.S. at 530 n.14. Respondents do not make that

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[7] In district court, the parties' experts did not calculate success rates for either removal order appeals to the BIA or petitions for review to the Ninth Circuit. After receiving Petitioners' brief, Respondents' expert performed those calculations. Respondents have provided Petitioners with that analysis. Respondents maintain the Court should disregard both sides' extra-record evidence, *supra* n.3, but will lodge their expert's analysis upon request.

argument. Moreover, nothing in the *Demore* record apprised the Court that the immigration court system requires detainees who contest removal to seek adjournments. Here the record establishes that fact. Resp. 23-25.

Every court of appeals to address the question has held that prolonged detention cannot be justified merely because delay arises from a good faith challenge to removal. *Id.* (collecting cases). Whether detention is warranted in such cases can be determined only through an individualized custody hearing. *Id.* at 23.

b. "It is not difficult to grasp the proposition that six months in jail is a serious matter for any individual . . . ." *Muniz* v. *Hoffman*, 422 U.S. 454, 477 (1975). Petitioners nonetheless suggest that Class members' liberty interests become *weaker* as detention lengthens. Petitioners erroneously "'minimize the importance and fundamental nature' of the individual's right to liberty." *Foucha* v. *Louisiana*, 504 U.S. 71, 80 (1992) (quoting *United States* v. *Salerno*, 481 U.S. 739, 750 (1987)).

Petitioners insist detained individuals have "greatly diminished due process interests" in freedom from imprisonment because their "removability" is usually established. P.Supp. 35-36. By "removability," however, Petitioners refer only to whether the Government proves its charges, not whether a removal order will be entered. People in removal proceedings do not lose their right to reside in the United States merely because the Government proves a basis for possible removal. They retain their status until a removal order is entered, which does not occur unless and until all applications for relief are also denied (or, for appeals, until the BIA affirms a denial). *Matter of Lok*, 18 I&N Dec. 101, 105 (BIA

1981). Seventy percent of Subclass members sought such relief, J.A. 96, tbls.25-26, and although the decision to grant relief is discretionary, all applicants have "a right to a ruling on [their] eligibility." *INS* v. *St. Cyr*, 533 U.S. 289, 308 (2001) (internal quotations omitted). If they win, they are *not* ordered removed, and retain a "'right under the basic immigration laws to remain in this country.'" P.Supp. 36 (quoting *Zadvydas*, 533 U.S. at 720 (Kennedy, J., dissenting)).[8]

In any event, the relevant due process question always remains whether continued detention is warranted to further the Government's interests, not whether charges against a detainee have been established. Seven Justices in *Zadvydas* agreed that even detainees who had conclusively lost the right to remain nonetheless had rights against prolonged arbitrary detention. R.Supp. 21.

5. Petitioners assert the Due Process Clause only protects against "indefinite and potentially permanent" detention. P.Supp. 34. Their argument is foreclosed by *United States* v. *Salerno*, 481 U.S. 739 (1987). Citing *Addington* v. *Texas*, 441 U.S. 418 (1979), and *Jackson* v. *Indiana*, 406 U.S. 715 (1972), *Salerno* held a statute authorizing detention for limited periods, often shorter than six months, "must be evaluated in precisely the same manner that we evaluated the laws in the cases discussed above." 481 U.S. at 749. *Salerno* upheld the pretrial detention scheme only because it provided—within days of arrest—a "full-blown adversary hearing" at which

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[8] Respondents refer to Class members as having "substantial defenses" if they have a substantial challenge to the charge or seek relief that, if successful, will prevent entry of a removal order. Resp. 20 n.5.

"the Government must convince a neutral decision-maker by clear and convincing evidence" that detention is necessary. *Id.* at 749-50; *id.* at 747 (describing hearing as "prompt" and citing 18 U.S.C. 3142(f)).

Petitioners assert that *Foucha* and *Addington* concerned only indefinite detention, but *Foucha* also relied on *Salerno*, 504 U.S. at 81, and *Addington* cited *In re Gault*, 387 U.S. 1, 12 (1967), which involved confinement of juveniles that was neither "indefinite [nor] potentially permanent." *Compare* 441 U.S. at 425, *with* P.Supp. 34.

6. In relying on *Barker* v. *Wingo*, 407 U.S. 514 (1972), and other speedy trial cases, P.Supp. 38-41, Petitioners again conflate the right to a hearing with the right to release. Those cases address the distinct constitutional question of when prolonged criminal proceedings so offend due process as to compel release (or dismissal) despite a finding of flight risk or danger. *Barker*, 407 U.S. at 519-20, 522. None of them condones prolonged detention without custody hearings. The detainees in those cases received initial custody hearings within days of arrest and at least one other custody hearing within the first six months of detention. *E.g.*, *State* v. *Brillon*, 183 Vt. 475 (2008) (two hearings within six months), *rev'd on other grounds*, 556 U.S. 81 (2009).[9] The relief ordered below is far more modest.

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[9] *E.g.*, *United States* v. *Quartermaine*, 913 F.2d 910, 912-16 (11th Cir. 1990) (four hearings within five months); *United States* v. *El-Hage*, 213 F.3d 74, 76-81 (2d Cir. 2000) (per curiam) (two within five months); *United States* v. *Orena*, 986 F.2d 628, 629-31 (2d Cir. 1993) (two within six months); *United States* v. *Tortora*, 922 F.2d 880, 882 (1st Cir. 1990) (three within one month); *United States* v. *Hare*, 873 F.2d 796, 797-98 (5th Cir. 1989) (two within three months); *United States* v. *Gelfuso*, 838

Petitioners also claim the speedy trial cases show that district courts can efficiently make case-specific determinations. P.Supp. 47. District courts in those cases preside over the underlying criminal proceedings, and defendants can easily request custody hearings directly from the court. Here, the removal cases are before IJs. It is therefore efficient and fair to permit the same IJs to conduct custody hearings without requiring detainees to pursue habeas relief first.

7. Petitioners assert that permitting IJs to release people found to present no flight risk or danger leads to increased recidivism. However, the record establishes that when IJs employ intensive supervision, as they have in thousands of cases, they obtain extremely high appearance rates. R.Supp. 36.

Petitioners cite extra-record Congressional testimony by a former ICE director as evidence of "significant" recidivism, P.Supp. 45, although she did not provide a recidivism rate. *Oversight of United States Immigration and Customs Enforcement: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 34, 46 (2016) ("I have not done the math"). Petitioners disclosed the basis for this testimony—data extracted from "RAP" sheets—two weeks ago, making comprehensive analysis impossible. A partial review reveals an analysis rife with error. Petitioners treat infractions (e.g., traffic violations) as convictions, count apprehensions by ICE as criminal arrests, overlook obvious inaccuracies in RAP sheets

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F.2d 358, 359 (9th Cir. 1988) (two within four months); *United States* v. *Zannino*, 798 F.2d 544, 545 (1st Cir. 1986) (per curiam) (two within five months); *United States* v. *Theron*, 782 F.2d 1510, 1511-12 (10th Cir. 1986) (two within three months); *United States* v. *Gonzalez Claudio*, 806 F.2d 334, 335-36 (2d Cir. 1986) (two within two months).

(e.g., offenses allegedly committed while a Class member was detained), count offenses by persons released under *Zadvydas* (who are released because no country will take them back, regardless of whether they present a flight risk or danger), and count offenses even if they likely occurred after immigration proceedings were complete.

Despite these biases, the extra-record material undermines Petitioners' claims. It shows 83.5% of 533 persons released beginning in 2012 had no post-release convictions. Among persons previously identified by Respondents as Class members, less than 1% were convicted of a violent felony after their release.

Respondents do not dispute that, as in all other contexts involving detention, some individuals granted release may fail to appear or commit offenses. But on this record, there is no basis to deprive *all* Class members of a hearing before an IJ to determine whether they may safely be released on conditions rather than face further preventive detention. Resp. 9-10, 39.[10]

III. UNDER THE DUE PROCESS CLAUSE, DETENTION BECOMES PROLONGED AT SIX MONTHS, AFTER WHICH AN INDIVIDUALIZED CUSTODY HEARING IS REQUIRED.

Outside the national security context, this Court has never approved incarceration for more than six

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[10] Class members' liberty interests are not satisfied by *Joseph* hearings. *Joseph* hearings do not consider danger, flight risk, or even whether a detainee is likely to be ordered removed. They mandate detention unless DHS's charges are frivolous, rendering any protection they afford largely illusory. Resp. 21 n.6; Supp. Amicus Br. of NIP and ILRC 20-22.

months without a custody hearing. R.Supp. 39-40. Experience in the circuit courts has shown that a presumptive time limit on prolonged incarceration without a hearing is critical to provide meaningful due process protection.

Petitioners believe setting a time limit gives detainees a "powerful incentive" to engage in dilatory tactics to obtain custody hearings. P.Supp. 43. But the injunction has been in effect for over four years, and the record contains no evidence of increased court backlogs. *Cf.* R.Supp. 47 n.13. Petitioners speculate that detainees will engage in delay tactics because release rates at bond hearings are somewhat higher than win rates in removal proceedings. P.Supp. 43. This implausibly assumes detainees act upon aggregate, non-public comparative data rather than their own circumstances, and rests on pre-injunction data that likely understates the win rate for released Class members. J.A. 520-23, 574-75.

The reality is the injunction creates little, if any, incentive for delay. IJs can and will order continued detention when, in their view, a Class member engages in dilatory tactics suggestive of flight risk. But, as Petitioners concede, detainees often have valid reasons to seek additional time. P.Supp. 41, 43.

Finally, Petitioners claim the injunction is over-inclusive because it permits bond hearings for people whose "detention pending removal proceedings is constitutional." P.Supp. 46. This argument again illustrates Petitioners' most basic error—they conflate the legality of detention with the legality of detention *without a hearing*.

IV. DUE PROCESS REQUIRES CERTAIN SAFEGUARDS AT CUSTODY HEARINGS FOR PROLONGED DETENTION.

A. The Government Must Bear The Burden Of Proof By Clear And Convincing Evidence.

Due process requires the Government to bear the burden of proof by clear and convincing evidence where, as here, it seeks to deprive an individual of a liberty interest "more substantial than . . . loss of money." *Addington*, 441 U.S. at 424. Petitioners claim protections routinely required in other prolonged detention contexts do not apply to immigration detention. But procedures that may suffice for admission decisions or brief immigration detention, *Carlson*, 342 U.S. at 546, do not suffice to justify prolonged detention.[11]

Petitioners believe placing the burden of proof on the Government would result in more released Class members, causing danger to society. But they cite no evidence that the Government has been unable to carry its burden in any case where release created an ascertainable risk of danger. Unsubstantiated fears have never sufficed to justify preventive civil detention. *See Zadvydas*, 533 U.S. at 690-91.

Nor is there any support for Petitioners' concern that bearing the burden would result in "information asymmetry," P.Supp. 52, or greater risk of flight for Arriving Subclass members. Experience has shown that six months is ample time for DHS to meet its burden through interviews and by accessing

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[11] The Bail Reform Act uses a "preponderance of the evidence" standard as to flight risk, but pretrial detention lengths are limited by the Speedy Trial Act. R.Supp. 51.

numerous national and international databases, fingerprint records, and immigration files. Arriving noncitizens who refuse to share information likely will not pass the credible fear interview. If they did, IJs would likely deem them flight risks. That Arriving Subclass members bear the burden at *admission* does not support a "judgment of caution," P.Supp. 51, when considering supervised release after they have passed credible fear interviews and been subjected to prolonged detention.

Neither statutory text nor history provides a clear basis to reject the longstanding due process norm that the Government bears the burden to justify prolonged civil detention. Petitioners cite 8 U.S.C. 1226(c)(2), which places the burden on noncitizens who satisfy a narrow exception to mandatory detention for Government witnesses, but that rule governs initial rather than prolonged detention. And while *Zadvydas* stated that noncitizens bear the burden to initiate habeas litigation, it made clear that a separate burden rule applies to administrative hearings before the agency. *See* 533 U.S. at 692 (criticizing "administrative proceedings" available to prolonged detainees because detainees bore the burden of proof).

In these circumstances, due process requires the Government to establish an individualized need for detention by clear and convincing evidence. *See Santosky* v. *Kramer*, 455 U.S. 745, 755-56 (1982) ("[T]he degree of proof required . . . 'is the kind of question which has traditionally been left to the

judiciary to resolve.'") (quoting *Woodby* v. *INS*, 385 U.S. 276, 284 (1966)).[12]

B. Hearings Must Occur Periodically And Include Consideration Of Detention Length.

Because the Government's justification for continued detention must be stronger when the deprivation of liberty becomes greater, Br. 47 (citing *Zadvydas*, 533 U.S. at 690, 701), it follows that IJs must conduct periodic hearings to consider the length of detention.

Petitioners claim the risk of erroneous deprivation without periodic hearings is "near zero," P.Supp. 48, because detainees may request a new bond hearing based on changed circumstances under 8 C.F.R. 1003.19(e). But in this context, "the bond hearing process would be fraught with peril if the Court were to place the burden on detainees to request a bond hearing," App. 143a, because Class members are often unrepresented, unfamiliar with the legal system, and lack English proficiency. App. 48a, 143a. That the Bail Reform Act adopts a "changed circumstances" standard also is not dispositive, because pretrial detention is governed by the "stringent time limitations of the Speedy Trial Act." *Salerno*, 481 U.S. at 747. Here, unless IJs consider detention length when assessing the Government's justification for additional detention, a Class member could be detained for years based on the showing made after six months.

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[12] Petitioners point to legislative history about detention bed space and burden of proof regulations. P.Supp. 53-54. Neither pertains to the burden of proof for prolonged detention.

Petitioners also claim the cost of periodic hearings "looms large." P.Supp. 49. They forfeited that argument by stipulating not to rely on the cost of hearings. J.A. 588. That stipulation was sensible given that bond hearings typically last ten to fifteen minutes, are often conducted by video-conference, J.A. 573, and save the Government *millions* of dollars because the costs of detention dwarf those of supervised release. J.A. 529, fig.2; J.A. 88-89, tbl.18.[13]

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[13] *Amici* raise several arguments that are foreclosed because Petitioners either abandoned or never raised them. Section 1226(e) does not bar the district court's jurisdiction both because it preserves review of "challenges [to] the statutory framework that permits . . . detention without bail," *Demore*, 538 U.S. at 517, and because it does not mention habeas. *Id.* Congress subsequently amended other provisions to foreclose habeas, but not Section 1226(e). *See* REAL ID Act of 2005, Pub. L. No. 109-13, §§ 101(e)-(f), 106, 119 Stat. 302, 305, 310-11 (amending several subsections of 8 U.S.C. 1252).

8 U.S.C. 1252(f)(1) also does not mention habeas. Moreover, Section 1252(f) does not bar relief for any "individual alien against whom [removal] proceedings have been . . . initiated," and therefore does not apply to Class members. It also exempts "the Supreme Court," which has independent authority to grant habeas relief. 28 U.S.C. 2241(a). *See also* App. 120a-126a. Section 1252(g) covers only three discrete actions, none of which is involved here. *See Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999).

Sovereign immunity does not apply because defendants are individual officers sued for injunctive relief, *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, 619-20 (1912), and because Congress waived it. 5 U.S.C. 702. Habeas jurisdiction is proper because all respondents are within the territorial jurisdiction of the district court. *Rumsfeld* v. *Padilla*, 542 U.S. 426, 447 (2004); App. 126a-127a. Finally, Petitioners waived any objections to personal jurisdiction and the use of class procedures for habeas cases by failing to raise them in the petition for certiorari.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

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Petitioners,

v.

ALEJANDRO RODRIGUEZ, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMERICAN BAR ASSOCIATION

Pursuant to this Court's Rule 37.3, amicus curiae American Bar Association ("ABA") respectfully submits this brief recommending that this Court affirm the determination below that, to ensure the Government's compliance with the Immigration and Nationality Act and the Due Process Clause of the Fifth Amendment to the Constitution, persons subject to detention under §§ 1225(b), 1226(c), or 1226(a) of Title 8 of the United States Code must be afforded individualized bond hearings after they have been detained for a prolonged period to determine whether they present a danger or flight risk, and that such hearings must occur periodically thereafter where detention continues.[1]

STATEMENT OF INTEREST

The ABA respectfully submits this brief as amicus curiae pursuant to Rule 37.3 of the Rules of this Court. The ABA is a voluntary, national membership organization of the legal profession. Its more than 400,000 members, from each state and territory and the District of

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1. This brief is filed with the consent of both petitioners and respondents, and letters reflecting those consents have been lodged with the Clerk of this Court. Pursuant to the Court's Rule 37.6, the ABA states that this brief has not been authored in whole or in part by counsel for a party and that no person or entity, other than the ABA, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. Neither this brief nor the decision to file it reflects the views of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption of the positions in this brief or reviewed the brief prior to filing.

Columbia, include prosecutors, public defenders, private lawyers, legislators, law professors, law enforcement and corrections personnel, law students, and a number of non-lawyer associates in allied fields.

The ABA is committed to protecting the constitutional and statutory rights of immigrant detainees. Since 1990, the ABA House of Delegates has maintained support for facilitating the exercise of the right to counsel; for detaining noncitizens only in extraordinary circumstances and only in the least restrictive environment necessary; and for considering alternative means of ensuring appearance at immigration proceedings. In August 2002, the ABA reaffirmed its commitment to these principles in a resolution adopted by the House of Delegates calling for the provision of prompt custody hearings for immigrant detainees before immigration judges, accompanied by meaningful administrative review and judicial oversight.

These principles are also reflected in the ABA's strong support for procedural safeguards in the criminal justice context, where the ABA has long been active. Among its most recent efforts, the ABA House of Delegates promulgated the latest edition of its Criminal Justice Standards on Pretrial Release (hereinafter "Pretrial Release Standards"), which represents a consensus of the legal community and contains a comprehensive set of guidelines intended to help promote fairness and balance in the criminal justice system. ABA Standards for Criminal Justice: Pretrial Release (3d ed. 2007), *available at* http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf. The first edition of the Pretrial Release Standards was described by former Chief Justice

Burger as the "single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history." Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251 (1974), *quoted in* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 Crim. Just. 10, 10 (2009).

These Pretrial Release Standards are guided by the recognition that deprivation of an individual's liberty while awaiting a final determination of his or her fate is "harsh and oppressive, subjects [individuals] to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support." Pretrial Release Standards, 10-1.1. While the Pretrial Release Standards are addressed principally to criminal detention, the ABA believes that procedural safeguards are also critical where, as here, immigrants are awaiting a civil proceeding—often housed in criminal detention facilities[2]—to determine whether or not they may be removed from this country.

In 2006, the ABA House of Delegates adopted a resolution opposing the detention of immigrants in removal proceedings except in extraordinary circumstances, which would require a specific determination of a threat

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2. United States Immigration and Customs Enforcement ("ICE") uses hundreds of facilities for immigration detention, the majority of which are state and local jails and correctional institutions where ICE contracts for bed space. This creates the anomaly of civil administrative detainees incarcerated alongside criminal defendants and inmates serving criminal sentences but without any of the procedural safeguards that are the norm in the criminal justice context.

to national security, another person, or public safety, or that the immigrant presents a substantial flight risk. *See* ABA Report 107E, adopted February 2006 (hereinafter "Report 107E"), *available at* http://www.americanbar.org/content/dam/aba/directories/policy/2006_my_107e.authcheckdam.pdf. Additionally, the ABA recommended in Report 107E that ICE implement alternatives to detention to ensure that immigrants appear in court; develop a process for appeals of ICE officers' determination of whether immigrants may be released from detention; and establish mechanisms to ensure full compliance with the law regarding post-order custody review and proper administrative review and judicial oversight of all detention cases. *Id.*

Most recently, in 2012, the ABA House of Delegates approved the ABA Civil Immigration Detention Standards ("Detention Standards"). *See* ABA Civ. Immigr. Det. Standards, 12A102, adopted August 2012, as amended in August 2014 by Res. 111, *available at* http://www.americanbar.org/content/dam/aba/administrative/immigration/abaimmdetstds.authcheckdam.pdf. These describe guiding principles for immigration detention, consistent with due process and principles of justice and fairness. They include that restrictions or conditions placed on immigrants should be non-punitive and the least restrictive means required to further the goals of ensuring the appearance of the immigrant in immigration court or effectuating removal. Detention Standards, § VII.C. To that end, the Detention Standards recommend requiring both prompt initial and continuing periodic objective determinations that the immigrant either presents a threat to national security or public safety, or that the immigrant presents a substantial flight risk that cannot

be mitigated through parole, bond, or a less restrictive form of custody or supervision. *See* Detention Standards, § II.C. The Detention Standards further encourage ICE to review detention placements regularly to ensure that individuals are detained for the minimum time necessary and are not detained indefinitely. Detention Standards, § III.D.

In addition to promulgating effective standards for immigration detention, the ABA has an extensive history of appearing as amicus curiae in immigration- and detention-related cases before this Court, including in the following cases: *Arizona v. United States*, 567 U.S. ___, 132 S. Ct. 2492 (2012); *Benitez v. Mata*, 540 U.S. 1147 (2004); *Demore v. Kim*, 538 U.S. 510 (2001); *Calcano-Martinez v. INS*, 533 U.S. 348 (2001); *Reno v. Flores*, 507 U.S. 292 (1993); *United States v. Salerno*, 481 U.S. 739 (1987); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991); *INS v. Nat'l Ctr. for Immigrants' Rights*, 502 U.S. 183 (1991); and *Reno v. Arab-Am. Anti-Discrimination Comm.*, 525 U.S. 471 (1999).

The ABA appears as amicus curiae in this proceeding because the questions presented have serious implications for the fair administration of justice and, in particular, for the constitutional and statutory rights of respondents to a timely determination of the reasonableness of their detention. Because these constitutional and legal questions are significant and substantially impact the legal justice system—in which the ABA maintains a fundamental interest—the ABA respectfully submits this brief.

SUMMARY OF ARGUMENT

The ABA submits this amicus brief for the limited purpose of describing its experience and that of the federal courts regarding efforts to protect immigrant detainees from unconstitutionally prolonged detention, and why this experience supports the Court of Appeals' determination to interpret the relevant statutes as fixing a time limit by which hearings must be conducted. The ABA agrees with the Court of Appeals that the status quo of relying on immigrants to challenge their detention period case-by-case—typically through habeas petitions—has led to serious due process problems. Many immigrants have been detained for years under 8 U.S.C. §§ 1225(b), 1226(c), or 1226(a) without a bond hearing to determine the lawfulness of their detention. The Court of Appeals' approach of interpreting the statutes to include a time limit by which the Government must conduct such hearings after the immigrant is first detained best avoids detention that violates an immigrant's due process rights. Decades of experience with individual cases in the Ninth Circuit have confirmed that—absent a temporal limit—the Government has not provided immigrants a timely hearing on whether their continued confinement was justified based on flight risk and danger.

Because due process protections apply to immigration detention, the Government must, within a reasonable time, justify continued confinement. Specifically, it must show, at a hearing before a neutral decision maker, that the particular detainee presents a sufficient risk of danger or flight to outweigh their constitutionally protected liberty interests. Where, as here, Congress does not expressly provide the specific timing and method by which

detained immigrants can test the legal basis for their detention, the canon of constitutional avoidance requires the Court to construe the applicable statutes to provide some means of testing whether detention is justified. Under the doctrine of constitutional avoidance, the Court interprets an ambiguous statute in a manner that avoids serious constitutional problems. Where Congress does not expressly set a time limit or establish a procedure for the Government to justify continued detention, the courts must construe the statutes in a manner that ensures compliance with the Constitution's due process requirements.

The Court of Appeals correctly determined that the rules of statutory construction, as informed by the Due Process Clause and prior case law, require that a hearing be granted to respondents within six months of their detention to determine whether they present a danger or a flight risk. The extensive history of these proceedings confirms that, absent such a deadline for the Government to conduct a hearing, individuals who may well be entitled to release are confined to languish in prison-like conditions for years. The Due Process Clause requires a bright-line rule fixing the period by which the Government must demonstrate at a bond hearing that continued detention is required because of an issue of safety or because the detainee presents an ongoing flight risk.

The case-by-case approach for evaluating the reasonableness of an immigrant's detention has resulted in unreasonably long and unpredictable detentions in the circuits that have adopted this kind of rule. These decisions typically depend more on the detention location and docket size of the court rather than on any consistent set of principles.

This Court has previously approved a bright-line rule for assessing when detention of individuals with final orders becomes presumptively unreasonable, and has also approved bright-line rules in other contexts. *Zadvydas v. Davis*, 533 U.S. 678, 699-701 (2001); *Clark v. Martinez*, 543 U.S. 371, 386 (2005); *see e.g.*, *Cheff v. Schnackenberg*, 384 U.S. 373, 380-81 (1966) ("*Schnackenberg*") (plurality opinion). The ABA thus urges this Court to affirm the use of a bright-line rule here to require bond hearings whenever detention under the relevant statutes exceeds a specific timeframe, and conduct periodic bond hearings thereafter. Such bright-line rules "provide some degree of certainty" and "articulate more clearly the boundaries of what is permissible" under the Constitution. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) ("*McLaughlin*") (announcing bright-line presumption that probable cause hearing within 48 hours is generally timely under the Fourth Amendment).

Finally, the Government does not meet its due process obligations by requiring detainees to file petitions for habeas corpus following their unduly lengthy confinement. Due process rights and the habeas privilege are distinct. Indeed, this Court has held that due process requires an administrative hearing to test detention without regard to whether a habeas remedy is also available. Even apart from the objectively inconsistent outcomes resulting from the case-by-case habeas approach, habeas procedures are particularly ill-suited to these circumstances for three reasons. First, ABA practitioners' experience as well as court data confirm that requiring detained immigrants to initiate habeas proceedings dramatically reduces their ability to obtain relief, because they rarely have access to counsel to navigate complex habeas procedures. Ingrid

V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 32 (2015) (showing that only 14% of detained immigrants were represented by counsel). Second, because detainees cannot file habeas petitions until their claims are ripe, immigrants must wait until their detention has already become unreasonable before even beginning the lengthy habeas process—thus further compounding the delay. Lastly, as the lower courts have themselves made clear, reliance on federal courts with crowded dockets necessarily prolongs detention, given the numbers of detainees and the cumbersome nature of habeas proceedings.

Absent a bright-line rule requiring a hearing before an immigration judge automatically after a fixed period of time, both Government officials and federal courts will be required to speculate regarding the point at which any immigrant's detention has likely become unreasonable. In *Demore*, a member of the Court's majority observed that an immigrant "could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified." *Demore*, 538 U.S. at 532 (Kennedy, J., concurring). Current U.S. Department of Justice Executive Office of Immigration Review ("EOIR") statistics reveal that, in the thirteen years since *Demore*, thousands of immigrants have been subjected to detention for years, without any determination that they presented a danger or flight risk. *See* EOIR, Certain Criminal Charge Completion Statistics (2016), *available at* https://www.justice.gov/sites/default/files/pages/attachments/2016/08/25/criminal-charge-completion-statistics-201608.pdf (showing thousands of detainee removal cases that lasted over 24 months from receipt

to initial case completion/decision, including in the period from 2003 to 2015). The Government has thus proved incapable of safeguarding detained immigrants' constitutional and statutory rights absent court-mandated, easily applied procedures. The experience of ABA practitioners, current EOIR statistics, the record below and the documented experience of prolonged detainees in other circuits all confirm that the concern expressed in the *Demore* concurrence is indeed reality. Thus, this Court should uphold the Ninth Circuit's ruling establishing a bright-line temporal limit on detention, after which time the Government must provide detainees with a bond hearing to determine if their continued detention is warranted by danger or flight risk and must provide periodic hearings thereafter.

ARGUMENT

I. To Avoid Serious Due Process Concerns, The Immigration Detention Statutes At Issue Must Be Read To Require A Hearing To Justify Detention Within A Reasonable Period

The ABA will not repeat issues more thoroughly addressed by the parties and the Court of Appeals below. The ABA notes that the Government does not appear to dispute that immigrants detained pursuant to 8 U.S.C. §§ 1225(b), 1226(c) and 1226(a) are entitled to due process protections. *See, e.g.*, Petr. Br. at 29, 47. This Court held that immigrants are entitled to freedom from excessive detention in *Zadvydas*, 533 U.S. at 690-96 ("the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent"). In enacting

these three statutes, however, Congress did not identify a mechanism for securing those rights. Although each of the statutes contains different provisions directed at different categories of immigrants, none expressly state the manner in which an individual may vindicate the constitutional right to an individualized hearing before a neutral decision maker to test the reasonableness of prolonged detention. The canon of constitutional avoidance requires therefore that the courts interpret the statutes to allow a workable means of conducting such a hearing, because to interpret the statutes otherwise "would raise serious constitutional problems." *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001); *see also Zadvydas*, 533 U.S. at 695 (employing the constitutional avoidance canon in interpreting 8 U.S.C. § 1231(a)(6)). As set forth below, the means employed by the Court of Appeals—though less stringent than those recommended and adopted by the ABA—adequately secure those rights by ensuring administrative review with clear standards within a fixed period of time. By contrast, ABA practitioners' and federal courts' experience has demonstrated that the case-by-case habeas petitions immigrants would be forced to file under the Government's interpretation would not adequately secure the important rights at stake here.

II. A Temporal Bright-Line Rule Is Necessary And Appropriate To Provide Uniformity And Clear Instruction On When The Government Must Conduct A Bond Hearing

To ensure that immigrants subject to prolonged detention pending removal proceedings may test the basis for their detention, the Ninth Circuit appropriately adopted a bright-line temporal approach, providing a clear

and consistent mechanism for such determinations. The bright-line approach is consistent with the ABA Detention Standards and related policies, which call for a prompt detention determination based on objective findings that the immigrant presents a danger to the community or a substantial flight risk.[3] These standards further provide that such review should take place within a set period of time and be regularly reviewed thereafter.[4]

A bright-line approach most appropriately ensures compliance with due process obligations and addresses the well-founded concerns of ABA members with the case-by-base approach—particularly that it produces needlessly prolonged detention periods and has caused inconsistent application of the law, resulting in arbitrary detention

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3. Report 107E (showing that the ABA supports "a prompt hearing" before an immigration judge for immigrants denied release, "including meaningful administrative review and judicial oversight"); Detention Standards, § II.G ("A noncitizen should only be detained based upon an objective determination that he or she presents a threat to national security or public safety or a substantial flight risk that cannot be mitigated through parole, bond, or a less restrictive form of custody or supervision.").

4. Detention Standards, § III.A(1) ("The intake, classification, and placement process should be used by DHS/ICE to determine whether a noncitizen should be released, placed in an alternative-to-detention (ATD) program or detained."); *id.* at § III.D ("In addition to assessing individuals in the initial intake process, DHS/ICE should regularly review its placement and classification decisions to ensure that residents are: (a) Detained for the minimum time necessary; (b) Not detained indefinitely; (c) Reclassified and, if appropriate, transferred to another kind of facility; and (d) Released if detention is no longer appropriate. The initial review of a resident's classification and placement should be performed no more than four weeks after a resident has entered a facility.").

determinations.[5] By contrast, the bright-line approach similar to the one adopted by this Court in *Zadvydas* and *Clark*, and as adopted by the Ninth Circuit, is better suited to achieve due process requirements, and is consistent with this Court's precedent.

Jurisdictions that have applied a case-by-case, multifactor test have experienced inconsistent and irreconcilable results that compound, rather than resolve, due process concerns. By contrast, the experience of lower courts and this Court in analogous contexts has demonstrated that a bright-line temporal rule is easier to administer and monitor, and gives both the Government and the immigrant fair opportunity to be heard by an administrative officer with appropriate expertise.

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5. In addition to preventing arbitrary detention, a bright-line rule helps prevent the normalization of prolonged detention, which itself compounds delays by producing institutional apathy. *See* Institute of Judicial Administration, American Bar Association, Juvenile Justice Standards: Standards Relating to Interim Status 12 (1979) (recognizing that delay in juvenile courts "tend[s] to institutionalize and legitimate the unwarranted detention that already exists") (citing Patricia Wald, *Pretrial Detention for Juveniles*, in PURSUING JUSTICE FOR THE CHILD 119, 126-27 (Margaret K. Rosenheim ed., 1976)), *available at* http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/IJ_Standards_Interim_Status.authcheckdam.pdf. Indeed, administrators often favor a bright-line system because it compels them to address demands that would otherwise go unmet. *Id.* ("Deadlines and absolute bars to detention may seem arbitrary, yet it is striking how frequently detention personnel ask for such limitations, realizing that they cannot cope with an unending stream of detainees.") (quoting Wald, PURSUING JUSTICE FOR THE CHILD at 126-27).

A. Because The Case-By-Case Approach Gives Rise To Inconsistent Determinations, It Results In Arbitrary Detention

The ABA's position in this proceeding draws upon the actual experience of federal courts that have employed the case-by-case approach in habeas proceedings to test the reasonableness of immigrants' lengthy detention. In those situations, district courts have been instructed by their respective circuit courts to evaluate various factors, including: (1) the total length of detention; (2) the likely duration of future detention; (3) the likelihood that the proceedings will end in a final removal order; (4) whether any delay in the proceedings can be attributed to the Government or the immigrant; and (5) in the context of a criminal noncitizen, a comparison between the length and nature of the current detention and the detention in prison for the crime that rendered the immigrant removable.[6] If the immigrant prevails in the federal court on his habeas petition by demonstrating that the length of his detention was indeed unreasonable, he is then entitled to a bond hearing by an immigration judge to determine whether he nonetheless poses a flight risk or danger to the community.

The standard of "reasonableness" as determined by these factors provides no uniform guidance as to when a bond hearing is required. Because of the systemic problem of prolonged detention, challenges to detention have repeatedly arisen in the federal courts, requiring them

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6. *Sopo v. U.S. Attorney Gen.*, 825 F.3d 1199, 1217-19 (11th Cir. 2016); *Reid v. Donelan*, 819 F.3d 486, 500 (1st Cir. 2016); *see also* Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Detention*, 65 Hastings L.J. 363, 396-98 (2014) (listing factors courts consider to determine "reasonableness" of detention).

to determine when detention has become "unreasonable." Not surprisingly, this has led to widespread confusion and inconsistent application. *See Lora v. Shanahan*, 804 F.3d 601, 615 (2nd Cir. 2015) (compiling cases of inconsistent determinations of reasonableness and concluding "the pervasive inconsistency and confusion exhibited by district courts in this Circuit when asked to apply a reasonableness test on a case-by-case basis weighs, in our view, in favor of adopting an approach that affords more certainty and predictability"); *Reid*, 819 F.3d at 497 ("the approach has resulted in wildly inconsistent determinations"); *Sopo v. U.S. Attorney Gen.*, 825 F.3d 1199, 1226 (11th Cir. 2016) (Pryor, J., concurring in part and dissenting in part) ("despite the best efforts of judges, courts have been unable to apply flexible reasonableness standards in a manner that generates predictable, consistent, and fair outcomes"); Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Detention*, 65 Hastings L.J. 363, 395-400 (2014) (analyzing the disparate application of reasonableness factors in district courts).[7]

Additionally, under this approach, courts have expressly expanded the "reasonable" period for detention to accommodate the size of their immigration dockets. *See Ly v. Hansen*, 351 F.3d 263, 271 (6th Cir. 2003) ("A

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7. A survey of district courts' habeas decisions reveals disparate handling of a number of factual determinations bearing on reasonableness, including: (i) the effect of applications or appeals the immigrant files in good faith, Anello, 65 Hastings L.J. at 398-99 nn. 193-94, (ii) the effect of administrative appeals by the Government, *id.* at 399-400 nn. 196-201, (iii) the relevance of the expected duration of future detention, *id.* at 400 nn. 202-03, and (iv) the relevance of the immigrant's likelihood of success in removal proceedings, *id.* at 400-01 nn. 204-07.

bright-line time limitation, as imposed in *Zadvydas*, would not be appropriate for the pre-removal period; hearing schedules and other proceedings must have leeway for expansion or contraction as the necessities of the case and the immigration judge's caseload warrant."); *see also Lora*, 804 F.3d at 615-16 ("[W]hile a case-by-case approach might be workable in circuits with comparatively small immigration dockets, the Second and Ninth Circuits have been disproportionately burdened by a surge in immigration appeals and a corresponding surge in the sizes of their immigration dockets."); *Reid*, 819 F.3d at 498 ("Moreover, the federal courts' involvement is wastefully duplicative. . . . This inefficient use of time, effort, and resources could be especially burdensome in jurisdictions with large immigration dockets."). The constitutional reasonableness of spending a year or more in an immigration detention facility, without being deemed dangerous or a flight risk, cannot depend on the location of the detention or the caseload of any particular judge. *See Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (holding that due process requires that "the nature and duration of commitment bear some reasonable relation to the purpose").

Some federal courts applying these factors have gone so far as to deem routine extensions, such as to pursue appeals or seek relief from other agencies, to be grounds to deny habeas relief. Anello, 65 Hastings L.J. at 399 n.194 (collecting cases). Penalizing an immigrant for his attorney's need for additional time to prepare or to pursue other meritorious relief offends ABA policies promoting the right to effective assistance of counsel. *See* ABA Model Rules of Professional Conduct, Rule 1.1 ("Competent representation requires the . . .

thoroughness and preparation reasonably necessary for the representation."); *see also id.*, Rule 1.3 cmt. 1 ("A lawyer should . . . take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.").

To add even further uncertainty, unpredictability, and inconsistency, the circuits have noted that the factors articulated are not exhaustive and that there may be "other factors that bear on the reasonableness of categorical detention." *Reid*, 819 F.3d at 501; *Sopo*, 825 F.3d at 1218. Without clarifying to some degree of certainty what constitutes "unreasonable detention," courts will continue to apply manifestly inconsistent, unpredictable, and seemingly arbitrary standards, *see* Anello, 65 Hastings L.J. at 398-401, depriving immigrants of the "'protection of the individual against arbitrary action of government,'" which this Court "ha[s] emphasized time and again [is] 'the touchstone of due process.'" *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989) (unpredictability and inconsistency are "incompatible with the Rule of Law"); *Sopo*, 825 F.3d at 1225 (Pryor, J., concurring in part and dissenting in part) ("[T]he risk that the case-by-case approach will result in unpredictable, inconsistent, or arbitrary outcomes itself raises serious due process concerns") (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)).

In short, experience of the federal courts, like that of ABA practitioners, has confirmed that employing a case-by-case approach to test the reasonableness of immigration detention periods actually compounds,

rather than resolves, due process concerns. The need for consistency, certainty, and the fair administration of constitutional guarantees thus favors a bright-line rule that allows a Government official to determine with confidence whether a detainee is entitled to a bond hearing.[8] *Cf. McLaughlin*, 500 U.S. at 56 ("[I]t is important to provide some degree of certainty so that States and counties may establish procedures with confidence that they fall within constitutional bounds."); *see Sopo*, 825 F.3d at 1226 (Pryor, J., concurring in part and dissenting in part) ("The clarity of [a six-month bright-line rule] would benefit not only detained aliens . . . , but also courts, which would not have to engage in a weighing of multiple factors merely to decide whether and when a hearing must be provided.").

B. The Court Has Recognized That Bright-Line Rules Best Protect Detainees' Constitutional Rights

Consistent with *Zadvydas* and *Clark*, this Court has favored bright-line rules when determining the constitutionality of the continued and prolonged detention of immigrants. In *Zadvydas*, applying the canon of constitutional avoidance to post-removal detention, this Court found it necessary "for the sake of uniform

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8. The Government's concern that a bright-line rule will result in the filing of frivolous appeals or deliberately dilatory tactics is unwarranted. The immigration judge can always consider whether the strength of the detainee's claim or the detainee's litigation conduct affects the reasonableness of granting a bond. *See Sopo*, 825 F.3d at 1226-28 (Pryor, J., concurring in part and dissenting in part) (recognizing that "[u]nder the bright-line approach, criminal aliens are not automatically released after six months").

administration" to set a "presumptively reasonable period of detention" of six months. *Zadvydas*, 533 U.S. at 699-701. The Court found six months to be appropriate because "Congress previously doubted the constitutionality of detention for more than six months." *Id.* at 701 (adopting presumption that detention beyond six months constitutes an unreasonable period of post-removal detention of removable noncitizens) (citing Juris. Statement of United States in *United States v. Witkovich*, O. T. 1956, No. 295, pp. 8-9); *see Clark*, 543 U.S. at 386 (2005) (extending *Zadvydas* to inadmissible noncitizens).

In *Demore*, the Court rested its decision upholding mandatory detention of criminal noncitizens pending removal proceedings on the limited duration of the detention. *See Demore*, 538 U.S. at 513 (authorizing "that persons such as respondent be detained for the *brief period* necessary for their removal proceedings") (emphasis added); *see id.* at 526 ("[G]overnment may constitutionally detain deportable aliens during the *limited period* necessary for their removal proceedings") (emphasis added). One Justice in *Demore* noted that a detainee "could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified." *Id.* at 532 (Kennedy, J., concurring). The Court therefore left open whether the statute authorized prolonged mandatory detention.

In *Demore*, the Court assumed removal proceedings last, on average, "roughly a month and a half in the vast majority" and "about five months in the minority of cases in which the alien chooses to appeal." 538 U.S. at 530. In fact, the Government now acknowledges these assumptions were erroneous, and that a true analysis of

the data would have shown that, when there is an appeal, the immigrant spends an average of more than a *year* in detention—more than double what the Court assumed in *Demore*. Petr. Br. 34-35 n.10. Over a decade later, the Government has failed to decrease detention time, forcing a detainee pursuing relief to face a significant probability of spending a year or more in detention. *See Rodriguez v. Robbins*, 804 F.3d 1060, 1072 (9th Cir. 2015). Despite the Government's failure to rectify the problem, the current process in place does little to ensure prolonged detention is met with a required bond hearing. Such categorical unreasonableness requires a *Zadvydas*-style categorical safeguard. *See Sopo*, 825 F.3d at 1230 (Pryor, J., concurring in part and dissenting in part).

A bright-line rule, as opposed to a case-by-case approach, would also be consistent with—and would meaningfully enforce—this Court's directive that, under the canon of constitutional avoidance, courts should apply a definite standard that avoids the serious constitutional problem altogether. *See Clark*, 543 U.S. at 384 (noting that the Court is not "free to 'interpret' statutes as becoming inoperative when they 'approach constitutional limits'"). Simply adopting a reasonableness standard, without definitive bright-line guidance, amounts to interpreting the statutes to "'authorize detention until it approaches constitutional limits,'" precisely the approach this Court rejected in *Clark*. *Id.*

Even outside the context of Due Process Clause requirements, this Court has implemented temporal bright-line rules and presumptions to limit the need for judicial oversight and to ensure government officials act within constitutional limits. *See McLaughlin*, 500 U.S. at

56 (creating a presumption that a probable cause hearing within 48 hours of arrest will generally comply with the Fourth Amendment); *Schnackenberg*, 384 U.S. at 380 (interpreting the Sixth Amendment to require a jury trial where more than six months of imprisonment is imposed).

In *McLaughlin*, the Court found it necessary to clarify a previous holding that the Fourth Amendment requires a "prompt" judicial determination of probable cause as a prerequisite to further pretrial detention after a warrantless arrest. *McLaughlin*, 500 U.S. at 47 (citing *Gerstein v. Pugh*, 420 U.S. 103 (1975)). The Court recognized that its previous standard was too "vague" to be effective because it failed to provide "sufficient guidance" to enforce the Fourth Amendment, resulting in "systemic challenges," and, in turn, requiring federal judges to "oversee[] local jailhouse operations." *Id.* at 55-56 ("Although we hesitate to announce that the Constitution compels a specific time limit, it is important to provide some degree of certainty so that States and counties may establish procedures with confidence that they fall within constitutional bounds."). Therefore, relying on processing-time data from the Court of Appeals, the Court held that 48 hours is the presumptive time limit for a probable cause hearing. *Id.* at 56-57; *accord Schnackenberg*, 384 U.S. at 380 (holding bright-line six-month sentence rule was required for "effective administration" of the "petty offense" exception to the constitutional right to jury trial).[9]

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9. The dissent in *Zadvydas* suggested that the six-month rule in *Schnackenberg* was only "proper 'under the peculiar power of the federal courts to revise sentences in contempt cases.'" *Zadvydas*, 533 U.S. at 712 (Kennedy, J. dissenting) (quoting *Schnackenberg*, 384 U.S. at 380). Since *Schnackenberg*, however, the Court has held the right to jury trial applies to the states through the Fourteenth

Similar to the vague standards of "promptness" in *McLaughlin* and "petty offense" in *Schnackenberg*, a "reasonableness" standard for detentions under the statutes at issue without a bright-line rule fails to identify when a bond hearing is constitutionally required. As demonstrated by the record before this Court, a reasonableness standard results in ineffective administration of constitutional rights, and inconsistent, unpredictable, and arbitrary detention determinations. The lower courts and the ABA both recognize the need and appropriateness of a bright-line rule, and such a rule would be consistent with due process and this Court's precedent. The Government has been unable to resolve the problem of prolonged detention, and a multifactor reasonableness test will do little to guide the Government's compliance with its due process obligations. Therefore, the ABA urges this Court to adopt a bright-line temporal rule for when immigration officials must afford a bond hearing on flight risk and dangerousness.

III. Possible Habeas Relief Does Not Ameliorate The Government's Due Process Violations

The Government acknowledges that the Due Process Clause imposes some temporal limit on detention: "[B]ecause longer detention imposes a greater imposition on an individual, as the passage of time increases a court may scrutinize the fit between the means and the ends

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Amendment, *Duncan v. Louisiana*, 391 U.S. 145, 162 (1968), and later applied the same six-month rule to *state courts*, *Baldwin v. New York*, 399 U.S. 66, 73-74 (1970), over which federal courts have no supervisory power to revise sentences. Therefore, as applied to the states, the six-month rule embodies the Court's broader authority to set bright-line rules for effective enforcement of constitutional rights.

more closely." Petr. Br. at 47 (citing *Zadvydas*, 533 U.S. at 690, 701). Having failed over several years to ensure that detention of immigrants does not extend for an unwarranted period, the Government now proposes to use individual habeas claims as a means to test the reasonableness of the period of detention. *Id.* Although the Government asserts unconstitutional applications of the statutes are rare and could be addressed through habeas proceedings (*see* Petr. Br. at 12, 14), neither the actual experience of courts nor the practical realities of habeas procedure suggest that such cases are rare, or that the habeas procedure provides an adequate substitute for a timely bond hearing before an administrative hearing officer. Indeed, the experience of ABA member practitioners has been that the only way to ensure fair and timely review is through "a prompt hearing before an Immigration Judge for any alien in removal proceedings who is denied release with or without bond, including meaningful administrative review and judicial oversight." Report 107E at p. 1.

A. Government Administrative Proceedings Must Afford Due Process Regardless Of Whether Habeas Is Also Available

This Court has already recognized that, even where federal habeas corpus is available, administrative processes must still safeguard due process rights. For example, in the context of civil commitment, this Court has held that due process requires an administrative process to protect against unreasonable detention, notwithstanding the availability of habeas review to challenge such civil commitment. *See, e.g., McNeil v. Director, Patuxent Inst.*, 407 U.S. 245, 257 (1972) ("It is

elementary that there is a denial of due process when a person is committed or, as here, held without a hearing and opportunity to be heard."); *Jackson*, 406 U.S. at 738 ("At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."); *Parham v. J.R.*, 442 U.S. 584, 608-17 (1979); *see Duncan v. Walker*, 533 U.S. 167, 176 (2001) (observing "federal habeas corpus review may be available to challenge the legality of a state court order of civil commitment").

Most recently, in the context of scrutinizing the purpose and duration of detaining enemy combatants, this Court directed use of proceedings with full due process rights, despite the fact that habeas proceedings remained available. Thus, in cases relating to detention at Guantanamo, the Court required an improved set of due process protections in military trials, notwithstanding the availability of the writ of habeas corpus to determine the availability of constitutional protections for these detainees. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (acknowledging that the Due Process Clause "informs the procedural contours of [habeas corpus] in this instance," but nonetheless setting forth requirements for hearings separate and apart from habeas, even though "[a]ll agree suspension of the writ has not occurred here"); *cf. Boumediene v. Bush*, 553 U.S. 723, 785 (2008) (holding that habeas must remain available even if detentions satisfy due process requirements); *see also Habeas Corpus and Due Process*, Brandon L. Garrett, 98 Cornell L. Rev. 47, 54 (2012) (discussing the "longstanding and consistent treatment of habeas process as independent of due process"); Lee Kovarsky, *Custodial and Collateral Process: A Response to Professor Garrett*, 98 Cornell L. Rev. Online 1, 1 (2013).

Following this Court's lead, the circuits have recognized that habeas review "is in no way the type of periodic review that due process requires." *J.R. v. Hansen*, 803 F.3d 1315, 1326 (11th Cir. 2015) ("Habeas can be at most a backstop—a failsafe mechanism, not the sole process available.") (citations omitted); *Doe v. Gallinot*, 657 F.2d 1017, 1023 (9th Cir. 1981) ("No matter how elaborate and accurate the habeas corpus proceedings ... may be once undertaken, their protection is illusory when a large segment of the protected class cannot realistically be expected to set the proceedings into motion in the first place. ... [¶] The bare existence of optional habeas corpus review does not, of itself, alleviate due process concerns.").

B. Habeas Has Proved To Be An Ineffective Remedy

Even if, in some contexts, a habeas proceeding could theoretically satisfy the Due Process Clause, an alternative procedure is required where, as here, habeas does not afford effective due process for a substantial number of detainees.

Habeas has proved inadequate as a practical matter for a number of reasons. As discussed above, the case-by-case "reasonableness" factors that courts apply in habeas review are nonexclusive and, when applied in isolation, different courts have produced wildly inconsistent, unpredictable, and seemingly arbitrary applications. *See* Section II.A *supra*. Apart from the arbitrariness inherent in case-by-case determinations, in the ABA's experience, the federal habeas process is inherently ill-suited to prevent immigrants from suffering unreasonably prolonged detention. First, the ABA's experience

and federal court data confirm that the complexity of habeas presents an insurmountable barrier to many detained immigrants, who would effectively be denied any opportunity for review. Second, habeas procedures inevitably compound—rather than relieve—the period of prolonged detention. Third, these petitions consistently languish on crowded federal court dockets due in part to the fact that virtually all expertise about the nature and purpose of confinement reside with administrative officials, leading courts themselves to question their current role in the process.

As a preliminary matter, requiring a habeas petition in federal court creates nearly insurmountable hurdles for the detained immigrant. An unrepresented detainee unfamiliar with the American legal system and who may not speak the language is poorly situated to navigate the complicated procedures of a habeas petition. *Reid*, 819 F.3d at 498 ("federal habeas litigation itself is both complicated and time-consuming, especially for aliens who may not be represented by counsel"); *Lora*, 804 F.3d at 615 ("Adopting a six-month rule . . . avoids the random outcomes resulting from individual habeas litigation in which some detainees are represented by counsel and some are not, and some habeas petitions are adjudicated in months and others are not adjudicated for years."); *Sopo*, 825 F.3d at 1226 (Pryor, J., concurring in part and dissenting in part) ("[C]larity and predictability is particularly critical in the immigration context, where detainees frequently lack knowledge of the American court system; the resources, financial and otherwise, to obtain an attorney; and the language skills required to navigate the legal thicket.") (internal quotations omitted).

Detained immigrants also lack meaningful access to legal assistance while confined. Based on its members' experience in this context, the ABA has observed that special efforts are required for immigrants even to "be able to meet with current or prospective legal representatives and other legal personnel." Detention Standards, § VII.A(1). From 2007 through 2012, in approximately 1.2 million removal cases, only 14% of detained immigrants were represented by counsel, compared to 66% of non-detained immigrants. Ingrid V. Eagly & Steven Shafer, 164 U. Pa. L. Rev. at 32; *see also* EOIR Yearbook 2015, at E3 ("Many individuals who appear before EOIR are indigent and cannot afford a private attorney."). Under the Government's approach, the vast numbers of immigrants who do not or cannot file habeas petitions because of the real and daunting challenges facing detained immigrants—whether in the form of language barriers, literacy barriers, lack of access to legal resources, or otherwise—will be denied their due process rights altogether.

The Government's approach also necessarily increases and compounds the period of prolonged detention among those already held beyond a reasonable period. Justiciability requirements can prevent immigrants from even starting the lengthy habeas process until after their detention has already become unreasonably prolonged, and may foreclose any relief entirely if the immigrant files too early. *Reid*, 819 F.3d at 498 ("[F]ederal courts are faced with a 'moving target' in such cases because petitioners presumably cannot challenge their detention until it becomes unreasonable, but, even if the petitioner prematurely lodges a challenge, the detention may become unreasonable during the pendency of the claim.") (citing

Diop v. ICE/Homeland Sec., 656 F.3d 221, 227 (3d Cir. 2011)). Thus, a petition may not properly be initiated until after the detention has exceeded reasonable limits, and, even if successful, merely initiates the administrative procedure for review of the reasonableness of detention that the Government should have provided long before.

Once filed, a federal court's case-by-case analysis of the overly complex reasonableness factors drains significant time and resources, translating into further prolonged detention. Experience operating under habeas-based regimes shows that such cases are lengthy, and add significantly to already unreasonably prolonged detentions. *See, e.g., Khalafala v. Kane*, 836 F. Supp. 2d 944, 947 (D. Ariz. 2011) (showing approximately two years and ten months from filing of habeas petition to district court decision adopting magistrate judge's recommendation); *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 945 (9th Cir. 2008) (two years from filing to district court's decision); *see also* Amicus Brief of Americans for Immigrant Justice, et al., in Support of Respondents, Argument, § III.B (detailing how, after this Court's decision in *Demore*, the mean decision time for a prolonged detention habeas case was nearly 19 months in the Eleventh Circuit, over seven and a half months in the First Circuit, and almost 14 months in the Sixth Circuit). Moreover, the prevalence of judicial emergencies in federal courts presiding over immigration detention centers confirms that immigrant habeas petitions are not being timely heard. *Compare Detention Facility Locator*, U.S. Immigration and Customs Enforcement, https://www.ice.gov/detention-facilities *with Judicial Emergencies*, United States Courts (showing correlation of judicial emergencies with concentrations of immigration detention

centers, including the Eastern District of Texas, which contains two detention centers and faces three judicial vacancies and 1,261 weighted filings per judgeship per year).

Indeed, the Sixth Circuit has raised "a question of institutional competence" in a system requiring that "federal courts undertake to supervise the reasonability of detention only via the habeas process." *See Ly*, 351 F.3d at 272. The court observed that immigration officials are "best situated to know which criminal aliens should be released, and federal courts are obviously less well situated to know how much time is required to bring a removal proceeding to conclusion." *Id.*

The unworkable habeas regime's inherent impediments to a timely bond hearing regarding flight risk and danger are incompatible with due process demands. The ABA has devoted decades to helping the courts provide "a fair and efficient immigration removal and detention system." Detention Standards, § II.E. Having studied the practical experience of courts and litigants, the ABA has overwhelmingly endorsed an administrative approach to safeguarding against unreasonable detention. To that end, the ABA has adopted standards—more strict than the Ninth Circuit's—calling for the Government to (i) initially assess whether an immigrant "should be released, placed in an alternative-to-detention (ATD) program or detained" (Detention Standards, § III.A(1).2); (ii) perform this initial assessment "no more than four weeks after a resident has entered a facility" (*id.* at § III.D); and (iii) "regularly review its placement and classification decisions to ensure that residents are . . . [d]etained for the minimum time necessary . . . and . . . [r]eleased if detention is no longer appropriate" (*id.*).

A requirement that immigration judges determine at a bond hearing held at a fixed point in time whether an immigrant is dangerous or presents a flight risk is an effective and efficient means of vindicating immigrants' due process rights. A periodic bond hearing requirement ensures that habeas fulfills its traditional role as a fail-safe—rather than the initial means—to prevent unlawful detention.[10]

The ABA in short concludes that the remedy proposed by the Court of Appeals falls within an appropriate range of remedies to address the constitutional problems posed by excessive detention of the immigrants in this case. In contrast, the Government's own figures confirm that it has systematically failed over decades to ensure timely review of the basis for immigrants' detention, notwithstanding the theoretical availability of habeas corpus. Accordingly, the ABA—whose members have wrestled with immigrant detention issues for decades—has concluded that an administrative bond proceeding conducted within some fixed time period to assess danger and flight risk is necessary to ensure fidelity to due process principles.

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10. *See Boumediene*, 553 U.S. at 732, 777 (citing instances in which Congress provided habeas substitutes but still "preserve[d] habeas review as an avenue of last resort"); *Martin-Trigona v. Shiff*, 702 F.2d 380, 388 (2d Cir. 1983) (recognizing "[a] habeas corpus petition is the avenue of last resort, always available to safeguard the fundamental rights of persons wrongly incarcerated").

CONCLUSION

For the foregoing reasons, amicus ABA urges the Court to affirm the decision below.

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RECORD
AND
BRIEF

No. 15-1204

IN THE

Supreme Court of the United States

DAVID JENNINGS, *et al.*,

Petitioners,

v.

ALEJANDRO RODRIGUEZ, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF OF AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMERICAN BAR ASSOCIATION[1]

Pursuant to this Court's Rule 37.3, amicus curiae American Bar Association ("ABA") recommends that the Court hold that the Constitution requires periodic hearings at fixed time intervals for immigrants subject to mandatory detention under 8 U.S.C. § 1225(b) and 8 U.S.C. § 1226(c), or eligible to receive an initial bond hearing under 8 U.S.C. § 1226(a), to determine whether they pose either a flight risk or danger that would justify their continued detention, because prolonged detention without a further hearing offends the protections of the Due Process Clause. The ABA further recommends that the Court hold that the Constitution requires the Government, and not the detained immigrant, to bear the burden of proof at such individualized hearing.

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[1] Pursuant to Supreme Court Rule 37.6, the ABA states that no counsel for a party authored this brief in whole or in part and that no person or entity, other than the ABA, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

Neither this brief nor the decision to file it reflects the views of any judiciary member associated with the ABA. The Court should not infer that any member of the ABA Judicial Division Council participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

The ABA is a voluntary, national membership organization of the legal profession. Its more than 400,000 members, from each state and territory and the District of Columbia, include prosecutors, public defenders, private lawyers, legislators, law professors, law enforcement and corrections personnel, law students, and a number of non-lawyer associates in allied fields. As set forth more fully in its amicus brief previously submitted in this case (Br. 1-5), the ABA has based its judgment both on the law and on the experience of its diverse members in various contexts to work with lawmakers, administrators, and the courts to ensure that the detention of immigrant populations comports with due process requirements. The ABA incorporates its Statement of Interest as set forth in its original amicus brief on file herein.

SUMMARY OF THE ARGUMENT

The Due Process Clause of the Constitution places limits both on the Government's ability to detain individuals and on their period of detention. In enacting 8 U.S.C. §§ 1225(b) or 1226(c), Congress did not expressly provide any mechanism by which immigrants detained pursuant to these laws would be guaranteed protection against confinement for an excessive period. Likewise, Congress provided no express time period in which immigrants detained pursuant to 8 U.S.C. § 1226(a) would receive a timely bond hearing. To avoid the serious constitutional issues raised by these omissions, the ABA in its initial brief urged this Court to apply the canon of constitutional avoidance and interpret each statute in question as containing a reasonable time limit, by

which a neutral decision maker must provide an individualized hearing on flight risk and danger to a person detained pursuant to one of these three provisions. Were this Court not to rely on the canon, the ABA concludes that each of these statutes would violate the Due Process Clause as applied to the class members because the statutes otherwise permit prolonged, and potentially indefinite, detention without any individualized hearing on flight risk or danger.

Although the ABA takes no position as to the precise time at which the Government must provide an individualized hearing on the grounds for an immigrant's detention, it has drawn upon its membership's experience to offer guidance regarding the procedural elements required to ensure a timely and adequate hearing that satisfies due process principles. Based on multiple studies by various task forces in a range of matters concerning detained individuals, the ABA has concluded that at least two elements are essential to ensuring due process. First, the Government must bear the duty to justify the basis for detention. Second, to ensure the Government's duty is carried out in a timely manner, some outer time limit must be established for an individualized proceeding. The ABA notes that the approach adopted by the Court of Appeals complies with both of these principles.

Accordingly, and to ensure due process, the ABA urges that the Court direct the Government to provide an individualized administrative hearing within a fixed time period to determine whether the

immigrant's detention is justified based on flight risk or danger.

ARGUMENT

I. Although The ABA Recommends Employing The Doctrine Of Constitutional Avoidance, It Agrees That 8 U.S.C. §§ 1225(b), 1226(c) And 1226(a) Are Constitutionally Infirm As Applied To Class Members By Permitting Prolonged And Excessive Detention Without An Individualized Hearing

Congress did not expressly provide any mechanism for ensuring that immigrants detained pursuant to 8 U.S.C. §§ 1225(b) or 1226(c) are provided individualized hearings to test the basis for their detention before they are detained for excessive periods. Congress also did not provide any time period in which immigrants detained pursuant to 8 U.S.C. § 1226(a) may seek a subsequent bond hearing where their detention is prolonged. *See* 8 U.S.C. § 1226(a)(2)(A).

The Fifth Amendment's right to due process is incompatible with prolonged civil detention without an individualized hearing to determine flight risk or danger. *See* Resp. Br. at 17-19. This is true as applied to all "persons" within the United States, including noncitizens, *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001), and as applied to deportation proceedings. *See, e.g.*, Petr. Br. at 29, 47 (recognizing Respondents' entitlement to due process protections); *Reno v. Flores*, 507 U.S. 292, 305-306 (1993). The ABA has therefore urged this Court to apply the

canon of constitutional avoidance and interpret each statute in question as containing a reasonable time limit within which a neutral decision maker must provide an individualized hearing to test whether detention is justified based on flight risk or danger. As set forth in the ABA's original amicus brief in this matter (Br. 10-11), interpreting the statutes otherwise "would raise serious constitutional problems." *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001); *see also Zadvydas*, 533 U.S. at 695. The ABA favors applying the doctrine of constitutional avoidance over expressly invalidating the entirety of, or portions of, these acts of Congress both out of respect for a coordinate branch of Government and to give Congress greater latitude to amend its legislation.

The Court's request for supplemental briefing, however, appears to seek the views of interested parties as to whether some or all of the three mandatory detention statutes at issue violate the Constitution. The ABA believes that each of the statutes does violate the Constitution because they all suffer from the same fundamental infirmity: absent a saving interpretation, each statute could, and has been, interpreted in a manner that results in the prolonged, and potentially indefinite, detention of individuals with no timely individualized hearing to determine the basis for their detention.

Government detention violates due process "unless the detention is ordered in a criminal proceeding with adequate procedural protections, or, in certain special and 'narrow' non-punitive 'circumstances,' where a special justification, such as

harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Zadvydas*, 533 U.S. at 690 (emphasis and citations omitted). Civil detention extending beyond, or not related to, its "special justification" runs afoul of due process. *See id.* (holding that detention is improper when it no longer bears a reasonable relation to the purpose for which the individual was committed); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (holding that, where detention's goal is no longer attainable, detention does not comply with due process); *Demore v. Kim*, 538 U.S. 510, 530 (2003) (finding detention permissible for the "limited period of his removal proceedings"). Each statute at issue is infirm because each could be, and has been, interpreted to permit indefinitely prolonged detention of individuals without any proceeding to determine that their detention remains reasonably related to its purpose.

II. The ABA's Experience Demonstrates Temporal Guidelines Are Required To Safeguard Due Process Rights

The ABA has extensive experience and understanding of the practical results of various enforcement regimes in securing the constitutional rights of detainees in numerous contexts. These include criminal proceedings, as well as various forms of civil proceedings such as involuntary commitments, juvenile detention, and immigration proceedings. The conclusions of ABA task forces that have studied these areas were the results of separate endeavors, by separate committees, at different times. Yet all of them came to the same conclusion—

that the best method for ensuring that timely review is granted is to set an outer time limit and an appropriate method of review based on the type of detainee and other relevant factors, and that such review must be conducted within that time limit. Their conclusions, which have been adopted by various courts, are reflected in decisions such as this Court's holding in *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

The ABA has not taken a position as to the specific point in time by which an individualized hearing must take place to ensure that these statutes satisfy constitutional norms, but agrees that the approach adopted by the Court of Appeals complies with two key principles that are essential to satisfying due process. First, the duty must rest with the Government to justify the basis for detention; second, to ensure this duty is carried out in a timely manner, some outer time limit must be established for an individualized proceeding.

A. The Burden Rests With The Government To Establish Grounds For Detention

This Court has consistently placed the burden on the Government, not the individual detained, to prove the justification for continued detention. *See, e.g., Foucha v. Louisiana*, 504 U.S. 71, 86 (1992); *Addington v. Texas*, 441 U.S. 418, 431-33 (1979); *County of Riverside*, 500 U.S. at 56. This is especially true in situations such as this, in which the individual detained has no right to appointed counsel, is confined in a manner that restricts access

to other resources, and is part of a uniquely vulnerable population.

B. An Outer Time Limit For An Individualized Hearing Ensures That Due Process Rights Are Protected

Relying on the input of prosecutors, defense attorneys, jurists, and distinguished experts, the ABA has repeatedly concluded that immigrant detainees must be afforded a timely review of the Government's basis for determining that the detainee presents a threat to public safety or a substantial flight risk that cannot be mitigated through parole, bond, or a less restrictive form of custody or supervision.[2] This conclusion reflects the ABA's extensive experience evaluating the effects of various immigration detention review proceedings, as well as standards to protect a detainee's constitutional rights in related contexts. The basis for this determination is set forth at length in the ABA's amicus brief and is reflected in the ABA's Civil Immigration Detention Standards ("Detention Standards"), which implement principles of justice, humane treatment, and due process.[3]

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[2] Brief of American Bar Association as *Amicus Curiae* in Support of Respondents, at p. 12, nn. 3-4 (quoting specific provisions from the ABA Civ. Immigr. Det. Standards, 12A102, adopted August 2012, as amended in August 2014 by Res. 111, *available at* http://www.americanbar.org/content/dam/aba/administrative/immigration/abaimmdetstds.authcheckdam.pdf).

[3] *See* Detention Standards, Acknowledgements.

The ABA's experience in the criminal justice and mental health contexts also lends support to this principle. The ABA's Criminal Justice Standards on Pretrial Release ("Pretrial Release Standards"), for example, call for a detained criminal defendant to be granted a prompt first appearance no later than 24 hours after the initial arrest, during which time the judicial officer must make a decision as to pretrial release based on a specific determination of flight risk or threat to the community.[4] This time frame comports with the nature of the detention, the status of the detainee, and the failure of less specific limits to ensure prompt probable cause review. The ABA has likewise endorsed the need for temporal boundaries for proceedings to evaluate the need for continued pretrial detention,[5] determine competence to stand trial,[6] and decide whether a speedy trial has been accorded.[7]

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[4] ABA Standards for Criminal Justice: Pretrial Release (3d ed. 2007), Standards 10-4.1, 10-5.3, *available at* http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf.

[5] Pretrial Release Standards, Standard 10-5.12 (allowing the defendant to file a motion with the court requesting that it re-examine the release decision, and requiring the parties to file a status report when the defendant has been detained for more than 90 days without a court order).

[6] ABA Criminal Justice Standards on Mental Health, Standard 7-4.12, adopted August 2016, *available at* http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/mental_health_standards_2016.authcheckdam.pdf (prescribing that a defendant's competence should be "periodically redetermined by the court" upon the occurrence of significant events and at

The ABA's Criminal Justice Standards on Mental Health ("Mental Health Standards") also endorse temporal limits for administering civil-commitment detention in compliance with the Due Process Clause. Those Standards condition civil commitment following a not guilty verdict by reason of insanity on the detaining authority preparing a detailed evaluation report within 30 days after the verdict.[8] This temporal guideline ensures that the government has timely stated its justification for commitment. The Standards further call for the prosecutor to move for a commitment hearing within five days thereafter, and direct that a hearing be held within 15 days of the filing of the evaluation

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periodic intervals of "30 days, 90 days, 180 days, and every 180 days thereafter"); *see also id.* at Standard 7-4.14 (requiring a hearing to determine whether the defendant is "unrestorable" within a set time after the defendant was deemed incompetent).

[7] ABA Criminal Justice Standards on Speedy Trial and Timely Resolution of Criminal Cases (3d ed. 2006), Standard 12-2.1(b), *available at* http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/speedy_trial.authcheckdam.pdf ("The presumptive speedy trial time limit for persons held in pretrial detention should be [90] days from the date of the defendant's first appearance in court after the filing of a charging instrument. The presumptive limit for persons who are on pretrial release should be [180] days from the date of the defendant's first appearance in court after either the filing of any charging instrument or the issuance of a citation or summons. Shorter presumptive speedy trial time limits should be set for persons charged with minor offenses.").

[8] Mental Health Standards, Standard 7-7.3.

report.[9] As in the immigration context, these temporal guidelines protect the due process rights of the vulnerable populations subject to detention, and properly place the burden on the government to justify the deprivation of liberty.

The ABA's experience thus reflects that the need for a fixed time limit in which to conduct a proceeding to justify continued detention applies across comparable categories of detainees. The Court's jurisprudence in other contexts confirms the need for such bright-line rules. *See, e.g., County of Riverside*, 500 U.S. at 56; *Cheff v. Schnackenberg*, 384 U.S. 373, 380-81 (1966). This approach works equally well to fulfill due process requirements regarding detention across the immigration, criminal prosecution, or involuntary civil commitment contexts. In each case, the liberty interest is sufficiently important to warrant meaningful review, the competing government interests are similar, and immigrants are as limited as these other groups—if not more so—in their ability to compel compliance with due process rights.

III. Habeas Is Inadequate To Ensure That Detained Immigrants Have A Meaningful Opportunity To Test The Reasonableness Of Their Detention

The Court has also solicited the views of interested parties regarding whether the approach adopted by the Court below is constitutionally required. The ABA's experience addressing case-by-

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[9] *Id.*

case determinations in this and related contexts confirms that some form of individualized administrative hearing must be conducted within a reasonable period of time.

The ABA's experience in multiple contexts has shown that, without a fixed deadline, governments lack necessary incentives to devote limited resources to providing timely proceedings. This may result in the government unintentionally, or in some cases deliberately, delaying review, and adopting strategies that have the actual and expected effect of significantly delaying or effectively eliminating review. These strategies may include requiring confined, impoverished, and non-English speaking or potentially illiterate individuals to initiate proceedings themselves, imposing the burden to prove government error on such individuals, or establishing review within a perennially sluggish and overcrowded adjudicative process.

The ABA's original brief (Br. 25-27) described how the complexity of habeas proceedings presents an insurmountable barrier to many detained immigrants, who would thereby be effectively denied any opportunity for review. Habeas is ill-suited to this particular context because it imposes a heavy burden on detained immigrants, who often are unrepresented and do not have the language comprehension and other skills required to understand the complexity of the federal court system. Habeas procedures and crowded federal dockets therefore inevitably compound—rather than relieve—the period of prolonged detention.

If the Court chooses to fashion a different approach from the Ninth Circuit, the ABA suggests that due process requires at the very least that some specific elements be retained. Specifically, the Court should require (i) that the Government provide a hearing directly in immigration court—i.e., without requiring detainees to file habeas petitions to obtain that hearing—and (ii) that the hearing occur within some specified period of time. In *Zadvydas*, this Court recognized that, after six months, if a detained immigrant provided good reason to believe that there is no significant likelihood of removal "in the reasonably foreseeable future" (such significant likelihood of removal being the underlying justification for the detention in the subject statute), the Government must respond with evidence sufficient to rebut that showing. 533 U.S. at 701. In other words, once the underlying justification for the detention ceases, the detention must end. *Id.*

The ABA recommends adopting a similar approach here, and requiring an individualized hearing to determine whether the immigrant's continued detention would offend the protections of the Due Process Clause. Compared to habeas relief, such a hearing would better comport with the findings of the ABA that the only way to ensure fair and timely review is through "a prompt hearing before an Immigration Judge for any alien in removal proceedings who is denied release with or without bond, including meaningful administrative review and judicial oversight." ABA Report 197E 1, adopted February 2006, *available at* http://www.americanbar.org/content/dam/aba/directories/policy/2006_my_107e.authcheckdam.pdf. This

hearing would not require immigrants to resort to the inadequate, lengthy, and burdensome habeas process to obtain an eventual determination of whether their length of detention has become unreasonable.

Experience shows that temporal guidance on the length of detention is ineffective without an automatic hearing. Otherwise, a judicial directive limiting detention to a "reasonable" period cannot defeat the proven tendency of the immigration system to let immigrants languish in detention. For example, although the Third Circuit held in *Diop v. ICE/Homeland Security*, 656 F.3d 221, 231, 233 (3d Cir. 2011), that a hearing under § 1226(c) would be necessary after a "reasonable" period of time, experience shows that immigrants were forced to continually rely on the faulty backstop of habeas corpus simply to obtain the hearing that the Government had been ordered to provide in a reasonable time. In *Chavez-Alvarez v. Warden York County Prison*, 783 F.3d 469 (3d Cir. 2015), it took the immigrant petitioner three years after detention to finally obtain an appellate court order directing a bond hearing based on his habeas petition. *See id.* at 470-71; *see also* Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Detention*, 65 Hastings L.J. 363, 390, 397-400 (2014) (reviewing Third Circuit mandatory detention case law and concluding that district courts have taken "inconsistent approaches to similar facts"). Such delays will likely remain widespread in the absence of an automatic hearing, and will continue to confound enforcement of detainees' due process rights.

Because the Government has demonstrated that it cannot prevent unconstitutional prolonged detentions in a system that relies on habeas review, the ABA believes due process requires an automatic hearing before an immigration judge within a fixed period of time. Immigration judges familiar with these cases are qualified to make such determinations. Indeed, immigration judges are already entrusted to determine whether an individual is "properly included" under the mandatory detention statute. *See* 8 C.F.R. § 1003.19(h)(2)(ii). Immigration judges and the Board of Immigration Appeals routinely hear claims by immigrants that they are not properly subject to the terms of the statute, and nothing precludes the immigration courts from hearing such matters. The ABA would therefore urge that any modifications of the Ninth Circuit's remedy at least provide an automatic hearing to determine whether continued mandatory detention has become unreasonable.

CONCLUSION

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). The ABA appreciates the opportunity to provide its insights to assist the Court in determining the scope of the Due Process Clause's carefully limited exception and the procedures required to ensure compliance with the Due Process Clause. For the foregoing reasons, amicus ABA urges the Court to affirm the decision below.

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AND
BRIEFS.

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IN THE

Supreme Court of the United States

DAVID JENNINGS, *et al.*,

Petitioners,

v.

ALEJANDRO RODRIGUEZ, *et al.*, Individually and on Behalf of All Others Similarly Situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE AMERICAN IMMIGRATION COUNCIL AND AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

The American Immigration Council ("Immigration Council") is a national nonprofit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of the immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Immigration Council frequently appears in federal courts on issues relating to the interpretation of the Immigration and Nationality Act, and undertakes research and advocacy relating to immigration enforcement. This case is of critical concern to the Immigration Council in light of its longstanding commitment to securing due process rights for immigrants in removal proceedings, including immigrants subject to detention.

The American Immigration Lawyers Association ("AILA") is a national association with more than 14,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members frequently represent detained foreign nationals before

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[1] No counsel for a party authored this brief in whole or in part, and no person, other than amici or their counsel, made any monetary contribution to the preparation or submission of this brief. All parties have filed letters consenting to the filing of all amicus briefs.

the Department of Homeland Security ("DHS") and the Executive Office for Immigration Review ("EOIR"), as well as before the United States District Courts, Courts of Appeals, and this Court.

SUMMARY OF ARGUMENT

In *Demore* v. *Kim*, 538 U.S. 510 (2003), this Court relied in large part on certain factual assumptions about immigration detention and removal to reject a facial constitutional challenge to mandatory detention under 8 U.S.C. § 1226(c). Those factual assumptions have proven obsolete at best and inaccurate at worst. The Court should reconsider *Demore* and confine it to the factual predicate on which it relied or else overrule it outright.

The Court in *Demore* assumed, based on information provided by the government, that noncitizens subject to Section 1226(c) would be confined for only a "brief" and "limited" period necessary for their removal proceedings, and in turn held that that deprivation of liberty was justified by the government's concerns with preventing danger and flight risk. 538 U.S. at 513, 526. Yet in an extraordinary letter filed on the same date as the government's opening brief in this case, the government admitted that much of the information it gave the Court was wrong, and that the Court's opinion misinterpreted other key data. Both the corrected data from the time of *Demore* and the overwhelming weight of evidence since then show that individuals held under Section 1226(c) often face substantially longer detention periods than the Court assumed. Intervening developments have also shown that mandatory detention is not necessary to address the safety and flight risk concerns on which the government and the Court relied in *Demore*.

Reconsidering *Demore* is all the more appropriate because it was an unjustified departure from this Court's otherwise uninterrupted recognition that the Constitution requires that civil detention be based on individualized process, not blanket legislative categories. Contrary to *Demore*'s suggestion, Congress's plenary power over *immigration* does not translate into a plenary power to detain individual *immigrants* without an individualized inquiry into the need to do so. Indeed, even if the data the government presented in *Demore* had been accurate, it in no way demonstrated that detaining people without individualized process was necessary to prevent flight or protect the public. Rather, the data showed that the government's interests were attributable primarily to resource constraints, which have since been alleviated through increased appropriations and changes to detention and removal procedures.

Demore's constitutional ruling should accordingly be confined to the circumstances the Court had before it, if not overruled entirely. *Stare decisis* is no obstacle, given that changed circumstances have removed any justification *Demore* ever had, have shown *Demore* to be unworkable, and have reinforced that its rule imposed severe and unnecessary burdens on constitutional rights.

ARGUMENT

I. DEVELOPMENTS SINCE *DEMORE* CONFIRM THAT BLANKET MANDATORY DETENTION CANNOT BE JUSTIFIED

The Court's reasoning in *Demore* upholding the constitutionality of mandatory detention under 8 U.S.C. § 1226(c) has been undermined by intervening events. As compelling data now demonstrates, the Court underestimated the length of detention under Section

1226(c) in cases where the detainee appeals; many immigrants are in fact imprisoned for months or years. *Demore* also failed to consider that many of those individuals will win their cases and thus will be entitled to remain lawfully in the United States. The immigrants' liberty interest under the Due Process Clause is thus much weightier than the Court in *Demore* suggested.

The government's interests in detention without individual process, by contrast, have only diminished. Alternatives to detention, such as in-person or telephonic check-ins and community-based case management programs, help ensure attendance at immigration proceedings; risk assessment tools can be used to analyze the risk of flight and danger to the community; and increased detention space reduces the likelihood that individuals who pose an actual threat or flight risk are released for resource-driven reasons. Those new advances significantly attenuate any interest the government had in blanket mandatory detention, without any individualized review, of everyone subject to Section 1226(c).

A. Because Mandatory Detention Is Significantly Longer Than The Court In *Demore* Suggested, Detainees' Liberty Interests Deserve Far Greater Weight

1. As the government now admits, *Demore*'s holding was based on erroneous information greatly understating the deprivation of liberty

This Court's decision in *Demore* rested on the understanding that individuals subject to mandatory detention were detained only for the "brief" and "limited" period necessary for removal proceedings, which, according to the decision, averaged "roughly ... *about five*

months in the ... cases in which the alien chooses to appeal." 538 U.S. at 513, 526, 530 (emphasis added); *see also Reid* v. *Donelan*, 819 F.3d 486, 499 (1st Cir. 2016) (*Demore*'s "holding was premised on the notion that proceedings would be resolved within a matter of months, *including* any time taken for appeal by the detainee").

Thirteen years later, the government now admits that *Demore*'s five-month figure was incorrect. *See* Letter from Acting Solicitor General Ian H. Gershengorn to Hon. Scott S. Harris 3, *Demore*, No. 01-1491 (Aug. 26, 2016) ("*Demore* Gov. Letter") (the Court's five-month calculation "was incorrect on the basis of EOIR's statistics at the time"). The government now states that, at the time of *Demore*, average detention in appealed cases actually *exceeded twelve months*, more than double *Demore*'s estimate. *See id.* ("The corrections EOIR has now made yield an average and median of 382 and 272 days, respectively, for the total completion time in cases where there was an appeal[.]").

The government's letter explains that, at the time of *Demore*, EOIR had calculated the average length of detention in appealed cases as 233 days—about eight months. *Demore* Gov. Letter 3. Yet the government admits that it "did not separately flag th[at] statistic[]" in its briefs in *Demore*. *Id.* The result was that the Court erroneously relied on other data to make its lower five-month estimate. *See id.* at 2-3; 538 U.S. at 529 (citing Pet. Br. 39-40). And the government now admits that even the 233-day figure reported by EOIR was an understatement; the correct number at the time of *Demore* was 382 days, more than twelve months. *Demore* Gov. Letter 3. And as explained below, even twelve months understates the actual average length of

detention for noncitizens subject to mandatory detention. *See infra* pp. 6-8.[2]

2. Since *Demore*, recent data shows that many individuals in mandatory detention are detained for far longer periods of time than the Court realized

Current EOIR data demonstrates that many Section 1226(c) detainees have been imprisoned much longer than the brief period contemplated in *Demore*. In its brief, the government refers to updated data compiled by EOIR that tracks the length of detention for mandatory detainees through 2015. Pet. Br. 35 n.10. That data reveals that, from 2003 to 2015, 32,654 people were detained for over six months, 10,027 people were detained for over a year, and 2,123 people were detained for two or more years. EOIR, *Certain Criminal Charge Completion Statistics* (Aug. 2016), https://www.justice.gov/sites/default/files/pages/attachments/2016/08/25/criminal-charge-completion-statistics-201608.pdf. The data further reveals that the average detention time in appealed cases has remained more than double the five-month estimate the Court relied on in *Demore*. *Id.* (336 days in 2001; 313 days in 2015).

Moreover, there are several reasons to believe that the EOIR data continues to understate the length of imprisonment of Section 1226(c) detainees. *First*, EOIR does not count the time an individual is detained prior to the government's filing of the charging document in immigration court, which formally commences removal proceedings. The government's statistics suggest that

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[2] The government does not explain why it took no action to advise the Court of the error in the *Demore* opinion until thirteen years later, when it filed its opening brief in this case.

this period can be "significant." *See Demore* Gov. Letter 11 n.3 ("In some instances, there is a significant period of time between issuance of the charging document by DHS, and filing the charging document with EOIR.").

Second, EOIR does not count the time spent in detention during any appeal to a federal court of appeals or during any remand proceeding before the agency—proceedings that can take months or even years. *See, e.g.*, ACLU, *Detained Without Process: The Excessive Use of Mandatory Detention Against Maryland's Immigrants* 9 (2016) ("*Detained Without Process*"), *available at* http://www.aclu-md.org/uploaded_files/0000/0858/mandatory_detention_report_2016.pdf (detention time for Section 1226(c) detainees who petition for review "runs closer to a year or longer, in some cases lasting up to two years or more"); *Sopo* v. *Attorney Gen.*, 825 F.3d 1199, 1202-1206 (11th Cir. 2016) (describing Section 1226(c) detainee who filed a petition for review and was detained for four years).

Third, and relatedly, the EOIR data does not accurately reflect the fact that individuals who have significant defenses to removal or meritorious claims for relief are detained much longer than those who do not challenge their removal at all. Like the Court's opinion in *Demore*, the EOIR data lumps all Section 1226(c) detainees into a single *average* length-of-detention figure, which necessarily masks the many cases in which individuals are detained for lengthy periods of time because they exercise their legal right to fight their deportation, often with success.

More probative is the data that forms the record in this case, which, unlike the EOIR data, was actually subject to adversarial testing through discovery and cross-examination. The record shows that 460 mem-

bers of the respondent Section 1226(c) subclass were detained for an average of 427 days (over fourteen months) with some individual detention periods exceeding *four years*. J.A. 92 (Table 20). Data for a similar class of Section 1226(c) detainees in Massachusetts reveals detention times of one to three years. *Reid*, 819 F.3d 486 (1st Cir. 2016) (No. 14-1270), Supp. App. for Appellee/Cross-Appellant A700(¶10), A701(¶19), A705(¶10), A706(¶16), A524(¶13), A732-733(¶¶8, 12), A521-522(¶¶4, 7, 8), A735(¶4), A737(¶13).[3]

Ironically, it is those noncitizens who have substantial challenges to or claims for relief from removal who are most likely to endure lengthy detention, as they assert their arguments before the agency, a federal appeals court, and through one or more agency remands. That also distinguishes this case from the premise of *Demore*, which was that Mr. Kim "conced[ed] that he was deportable." 538 U.S. at 514.[4]

For example, the record here shows that the vast majority of respondent Section 1226(c) subclass members—who were all imprisoned for more than six

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[3] Amici are prepared to lodge the *Reid* appendix with the Court upon request.

[4] As the *Demore* dissents pointed out, the Court's assumption was questionable even based on the record in *Demore*, because Mr. Kim was in fact "challenging his removability." *Demore*, 538 U.S. at 542 (Souter, J., dissenting); *see also id.* at 577 (Breyer, J., dissenting). Indeed, Mr. Kim was ultimately held *not* removable and his removal proceedings were terminated because his criminal convictions were found not to constitute deportable offenses—but only after Mr. Kim had been re-detained for an additional ten months. *See Matter of Kim*, A027-144-740 (I.J. Jan. 6, 2014); Brief of Petitioner, *People* v. *Kim*, No. S153183, 2007 WL 4792392, at *28 (Cal. Nov. 28, 2007). Amici are prepared to lodge Mr. Kim's Immigration Judge decision with the Court upon request.

months—were *prima facie* eligible for relief from removal, and a significant number (38%) won their cases. J.A. 135 (Table 38); *see* J.A. 93 (Table 21) (73% applied for relief from removal); *see also Detained Without Process* 7 (describing a Maryland study where "more than half [of Section 1226(c) detainees] may have been eligible for some form of relief from removal"). The success rate for mandatory detainees was more than five times greater than the success rate of the general detained population in removal proceedings. *Compare* J.A. 86 (Table 17).

For those Section 1226(c) detainees, their lengthy detention can create substantial difficulty while they fight to remain in the United States. For example, Anthony Whyte, a lawful permanent resident ("LPR") since 1981 with seven U.S. citizen children, seven U.S. citizen siblings, and a U.S. citizen father, was detained for more than twenty-six months, causing extreme financial and emotional hardship to his family. *Reid*, Supp. App., A699-701(¶¶4-6, 10, 18-19). Mr. Whyte eventually won his petition for review at the First Circuit, which vacated his removal order because Mr. Whyte's conviction was not even a removable offense. *Whyte* v. *Lynch*, 807 F.3d 463, 465 (2015), *reh'g denied*, 815 F.3d 92 (1st Cir. 2016).

3. Once the facts are properly considered, immigration detainees' liberty interests deserve far greater weight, and the government's interests far less weight, than the Court articulated in *Demore*

Despite acknowledging the extraordinary errors in its representations to the Court in *Demore*, the government's suggested remedy is woefully insufficient; the government asks only that the Court "amend its

opinion to delete [the five-month] clause." *Demore* Gov. Letter 3. Amici respectfully suggest the problems created by the government's inaccurate submission in *Demore* are not so narrowly confined. The Court's acceptance of the government's figures was not a passing statement, but rather a core basis of the opinion, and "delet[ion]" of the Court's reliance on them calls for a reevaluation of the opinion's reasoning and result.

The Court's mistaken assumptions about the brevity of mandatory detention were essential to its ruling that a noncitizen's liberty interest in avoiding confinement deserved slight regard in the due process analysis. *See Demore*, 538 U.S. at 513, 526, 530. But the facts as now revealed, both through the government's admissions and the developed record in this case, show that individuals who spend months or years in detention challenging their removal and winning their cases have a much stronger liberty interest than the Court previously articulated. Every circuit that has addressed the issue since *Demore* has so found, concluding that prolonged mandatory detention under Section 1226(c) raises serious concerns under the Due Process Clause. *See, e.g.*, *Reid*, 819 F.3d at 494; *Diop* v. *ICE/Homeland Sec.*, 656 F.3d 221, 235 (3d Cir. 2011) ("We do not believe that Congress intended to authorize prolonged, unreasonable[ ] detention without a bond hearing.").

Moreover, the government's interest in subjecting noncitizens to prolonged detention without any individualized process is diminished for those individuals who are pursuing substantial challenges to their removal. Because those individuals are seeking to vindicate their right to remain in the United States, the government's interest in detaining them is much lower than for those who concede removability. *See Demore*, 538 U.S. at 531 (Kennedy, J., concurring) ("[T]he ultimate purpose be-

hind [Section 1226(c)] detention is premised upon the alien's deportability."); *Reid*, 816 F.3d at 500 ("As the likelihood of an imminent *removal* order diminishes, so too does the government's interest in detention *without a bond hearing*."); *see also id.* at 499 ("As Justice Kennedy noted in his *Demore* concurrence, the government's categorical denial of bond hearings is premised upon the alien's *presumed* deportability and the government's *presumed* ability to reach the removal decision within a brief period of time." (citing *Demore*, 538 U.S. at 531 (Kennedy, J., concurring))).

The Court's assumption that "releasing deportable criminal aliens on bond would lead to an unacceptable rate of flight" (538 U.S. at 520) has also been undermined. The Court relied on data suggesting "that one out of four criminal aliens released on bond absconded prior to the completion of his removal proceedings." *Id.* In this case, the government claims that, in 2015, 41% of "initial case completions by immigration judges for released aliens ... were *in absentia* orders after the alien absconded." Pet. Br. 22.

Once again, there are several reasons to be skeptical of the government's *in absentia* figures. Had the government subjected its statistical assertions to adversarial testing, the courts below would have been able to consider them in light of recent analysis by the Transactional Records Access Clearinghouse ("TRAC"), which found that the actual rate in 2015 of individuals who failed to appear after being released on bond by an Immigration Judge ("IJ") was only 14%. *See* TRAC, *What Happens When Individuals Are Released On Bond in Immigration Court Proceedings?*, App. Table 3 (Sept. 14, 2016), http://trac.syr.edu/immigration/reports/438/. TRAC explains that the government's 41% figure is a serious mischaracteriza-

tion for three reasons. First, the government ignores that its figure pertains to *all* releases that lead to *in absentia* orders, not only individuals released by IJs after bond hearings. *Id.* Second, the government's figure reflects the outcome only of initial proceedings, not final proceedings; individuals who inadvertently miss a hearing, successfully reopen their cases, and appear at later hearings are still counted as "*in absentia*" by the government. *Id.* at n.7. Third, the government's supposed *in absentia* rate arbitrarily excludes "around a quarter of the cases" that immigration courts decided in favor of the noncitizen in 2015. *Id.* And, as the following section demonstrates, the actual *in absentia* rate would decrease even further if the government were to employ alternative methods of addressing flight risk developed since *Demore*.

Demore is the second immigration case in which the government has recently admitted providing inaccurate information to this Court. In 2012, the government informed the Court that, in *Nken* v. *Holder*, 556 U.S. 418 (2009), the government had erroneously argued that it had a "policy and practice" of restoring deportees who won their cases to their pre-removal status—a representation on which the Court had relied in the *Nken* opinion. Letter from Deputy Solicitor General Michael R. Dreeben to Hon. William K. Suter, *Nken*, No. 08-681 (Apr. 24, 2012); *see* 556 U.S. at 435. The government's errors in *Demore* and *Nken* are not surprising; factual assertions submitted for the first time in this Court have not been tested through the adversary process of discovery and cross-examination, but rather represent one litigant's hearsay statements about its own practice. The Court has now been twice bitten; it should be especially wary of relying on untested government statistics when weighing critical liberty interests.

B. The Government's Interest In Mandatory Detention Is Also Significantly Lower Due To Changes In Detention And Removal Procedures

The government's interest in mandatory detention is also significantly less forceful than it was at the time *Demore* was decided because procedures have since been adopted that provide alternatives to Section 1226(c)'s blanket detention regime.

1. Alternatives to detention

In 2003, the government's primary means of ensuring that individuals appeared for their removal proceedings was to detain them. Since then, the government has implemented alternative-to-detention programs that allow detainees to be released on bond and other conditions of supervision, which have significantly reduced the risk that they will fail to appear at immigration proceedings.

The government's primary alternative-to-detention program for individuals in removal proceedings is the Intensive Supervision Appearance Program ("ISAP"), which was launched in 2004. Operated by the private firm BI Incorporated, ISAP employs a comprehensive case management system and location monitoring systems to facilitate hearing attendance and compliance with final court orders. *See* The Intensive Supervision Appearance Program, https://bi.com/immigration-services/ (last visited Oct. 24, 2016). ISAP has two supervision options. The "full-service" option includes intensive case management, in-person supervision, unannounced home visits, employer verification, electronic monitoring technology, and individual service plans incorporating legal, translation, and transportation services, referrals to community resources, and departure

preparation. *Id.* The "technology-only" option consists of electronic monitoring only. *Id.* The electronic monitoring services, used for both options, include ankle bracelets that enable Global Positioning System ("GPS") monitoring or the installation of biometric voice recognition software for telephonic reporting. U.S. Gov't Accountability Office, Rep. No. GAO-15-26, *Alternatives to Detention* 10-11 (2014), *available at* http://www.gao.gov/assets/670/666911.pdf.

ISAP has been effective at ensuring that individuals in removal proceedings do not abscond.[5] From 2011 to 2013, "over 99 percent" of participants in the full-service program "with a scheduled court hearing appeared at their scheduled court hearings." *Id.* at 30; *see also* J.A. 565 (testimony of Eric Saldana, U.S. Immigration and Customs Enforcement ("ICE") Assistant Field Office Director, stating that compliance with ISAP in the San Bernardino, California area is "at, if not close to, 100 percent ... for people going to their immigration court hearing pre-order"). As ICE's 2016 congressional budget request states, ISAP "can be a cost-effective way to ensure individuals' appearances for immigration hearings and for removal" and "significantly lowers the risk that aliens ordered removed will become fugitives." Dep't of Homeland Sec., *U.S. Immigration and Customs Enforcement Salaries and Expenses* 3 (2016),

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[5] Community-based alternative-to-detention programs remain preferable to electronic monitoring. Community-based programs help ensure immigrants' attendance at their removal proceedings without restrictions on their liberty and facilitate their access to legal services and culturally appropriate case management. Lutheran Immigration and Refugee Service, *Community-Based Alternatives to Immigration Detention*, http://lirs.org/our-work/people-we-serve/immigrantsfamilies/alternatives-to-detention/ (last visited Oct. 24, 2016).

available at https://www.dhs.gov/sites/default/files/publications/DHS_FY2016_Congressional_Budget_Justification.pdf.

2. Risk assessment tools

At the time of *Demore*, the government did not have sophisticated tools to assess which Section 1226(c) detainees would pose a greater flight risk or public safety threat, and accordingly argued that it had a pressing need to detain all of them. Since then, many states have developed risk assessment tools for pretrial criminal detainees that, as empirical studies have demonstrated, accurately predict flight risk and likelihood of reoffending. Pretrial Justice Institute, *Pretrial Risk Assessment: Science Provides Guidance on Assessing Defendants* 2 (2015), *available at* http://www.pretrial.org/download/advocacy/Issue%20Brief-Pretrial%20Risk%20Assessment%20(May%202015).pdf.[6]

ICE also implemented its own risk assessment tool in 2013, called the Risk Classification Assessment ("RCA"), to assess which immigration detainees can safely be released during the pendency of removal proceedings. *See* Noferi & Koulish, *The Immigration Detention Risk Assessment*, 29 Geo. Immig. L.J. 45, 48

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[6] *See also* Am. Bar Ass'n, *ABA Standards for Criminal Justice: Pretrial Release* 54 (3d ed. 2007), *available at* http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf (recommending that every jurisdiction "establish a pretrial services agency or program to ... present risk assessments"); Nat'l Conf. of Chief Justices, Resolution 3 (Jan. 30, 2013), *available at* http://ccj.ncsc.org/~/media/Microsites/Files/CCJ/Resolutions/01302013-pretrial-release-Endorsing-COSCA-Paper-EvidenceBased-Pretrial-Release.ashx (urging "adoption of evidence-based assessment of risk in setting pretrial release conditions").

(2014). Using information gathered from an intensive interview when the noncitizen is first detained, the RCA assigns risk scores, which classify each individual as "high," "medium," or "low" risks of flight and danger. *Id.* at 47-48. ICE then uses the risk scores to generate standardized recommendations for (1) detention or release; (2) custody classification level for detained individuals; (3) immigration bond amount, if applicable; and (4) community supervision level (including ISAP) for released individuals. *Id.* at 65. Although commentators have criticized the RCA as being biased in favor of detention, *id.* at 76-81, ICE's adoption of the RCA shows that it has the capacity to develop more precise and empirically grounded mechanisms for making detention and release decisions.

Furthermore, a recent study based on 485 RCA scores found that "mandatory detainees are no more dangerous, or risky, than any other immigrant in immigration custody," including those who are eligible for bond or released outright. Koulish, *Using Risk to Assess the Legal Violence of Mandatory Detention*, Laws 15 (2016), *available at* http://www.mdpi.com/2075-471X/5/3/30/htm. For example, 75% of mandatory detainees were classified by ICE as only medium or low risks to public safety. *Id.* at 9. These scores were similar to those for individuals for whom ICE is permitted to make a discretionary determination as to their bond or release. *Id.* Mandatory detainees were also found to pose a *lower* flight risk than discretionary detainees; most of their convictions were for minor non-violent crimes, and many had strong family and community ties. *Id.* at 10-11. Overall, under ICE's own guidelines, 5% of those mandatorily detained should have been released outright, and 48% should have been referred to a supervisor for a discretionary detention decision. *Id.* at 9.

Although the RCA has not been supported by empirical research—and may still lead to more detention than is appropriate—the government's application of risk assessment to immigration detainees demonstrates two critical facts: First, ICE has the capacity to develop refined tools that would more accurately predict which individuals should be detained and which can safely be released; and second, its own risk assessment tool demonstrates that many immigrants subject to mandatory detention can be safely released.

Thus, unlike at the time of *Demore*, ICE is now able to make, and does make, individualized assessments regarding flight risk and danger, and many individuals currently subject to mandatory detention are—under ICE's own assessment criteria—no more a risk of flight or to public safety than those who are eligible for release on bond or released outright.

3. Increased detention space

In *Demore*, the Court credited Congress's concern that "criminal aliens" were released from detention not based on whether they "present[ed] an excessive flight risk or threat to society," but rather based on "severe limitations on funding and detention space." 538 U.S. at 519; *see also id.* at 563 (Souter, J., dissenting) (limited detention space "meant that the INS often could not detain even the aliens who posed serious flight risks" and "had led the INS to set bonds too low"); *id.* at 563-564 (flight "rates were alarmingly high because decisions to release aliens in proceedings were driven overwhelmingly by a lack of detention facilities" (internal quotation marks omitted)). Congress noted that "the INS had only 3,500 detention beds for criminal aliens in the entire country." *Id.* at 563 (citing S. Rep. No. 104-48 (1995), at 23).

That problem no longer exists. Due to a series of congressional directives and administrative decisions, beds for immigration detainees have increased significantly. *See, e.g.*, Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2498 (providing funding to ICE so that it "shall maintain a level of not less than 34,000 detention beds").

* * *

Demore was based on factual assertions that were wrong when proffered and are wrong today. The record in this case—and even EOIR's new data—show that respondents' liberty interest is far stronger and the government's countervailing interest far weaker than the Court previously suggested. At the very least, therefore, *Demore* should be confined to the factual predicate on which it purportedly rested, and which plainly does not govern the very different facts presented in this case. As the balance of this brief shows, however, *Demore*'s constitutional analysis was incorrect even on its own factual premises, because it was and remains irreconcilable with the Court's due process jurisprudence in the civil detention context.

II. *DEMORE* WAS INCORRECT EVEN ON ITS OWN PREMISES AND SHOULD BE OVERRULED

A. The Constitution Requires That Deprivations Of Individual Physical Liberty Result From An Individualized Determination Of Flight Risk And Danger—Including For Immigrants

The "Due Process Clause applies to *all* 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001) (emphasis added). "Freedom from imprison-

ment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." *Id.* at 690; *see also Kansas* v. *Hendricks*, 521 U.S. 346, 356 (1997) ("[F]reedom from physical restraint 'has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.'" (quoting *Foucha* v. *Louisiana*, 504 U.S. 71, 80 (1992))). Accordingly, physical detention requires "special justification" that "outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Zadvydas*, 533 U.S. at 690 (quoting *Hendricks*, 521 U.S. at 356). In particular, due process requires that "the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972).

Furthermore, due process prohibits detention without "adequate procedural protections." *Zadvydas*, 533 U.S. at 690. In numerous cases decided before *Zadvydas*, this Court made clear that "adequate" protections must include individualized process in which the government bears the burden of proving to a neutral factfinder that detention is necessary. For example, in upholding the constitutionality of pretrial detention without bond under the Bail Reform Act, this Court stressed that the act permitted such detention only after "a full-blown adversary hearing" in which "the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." *United States* v. *Salerno*, 481 U.S. 739, 750 (1987). Likewise, in *Hendricks*, this Court upheld a state statute permitting involuntary civil commitment for certain sex offenders because the statute required "strict procedural safeguards" including a

jury trial and proof beyond a reasonable doubt. 521 U.S. at 368; *see also Addington* v. *Texas*, 441 U.S. 418, 433 (1979) (state may not civilly commit a mentally ill individual without showing by "clear and convincing evidence" that the person was dangerous to others). And in *Foucha*, this Court struck down a state civil commitment statute that placed the burden on the detainee to prove eligibility for release. 504 U.S. at 81-83.

Due process also requires that the class of persons subject to confinement be narrow and the duration of confinement appropriately limited. *Zadvydas*, 533 U.S. at 691. For example, in *Salerno*, this Court emphasized that no-bond pretrial detention could apply only to defendants suspected of "the most serious of crimes" and that pretrial detention was temporally limited "by the stringent time limitations of the Speedy Trial Act." 481 U.S. at 747. The statute in *Hendricks* similarly permitted detention only of "a limited subclass of dangerous persons" who had committed "a sexually violent offense" and who suffered from "a mental abnormality or personality disorder" disposing them to sexual violence—and even then, detention was reviewed annually. 521 U.S. at 357 (internal quotation marks omitted). Conversely, the statute this Court struck down in *Foucha* contained no time limitation. 504 U.S. at 82.

This Court made clear in *Zadvydas* that these principles apply with equal force to immigration detention. The government had argued that the relevant statute, 8 U.S.C. § 1231(a)(6), placed no limit on the length of time for which a person ordered removed could be detained while the government attempted to effectuate removal. 533 U.S. at 689. This Court observed that the government's reading raised "serious" and "obvious" constitutional problems. *Id.* at 692. In particular, the statute did not narrowly target particularly dangerous nonciti-

zens, but rather affected "aliens ordered removed for many and various reasons, including tourist visa violations," and was not subject to time limitations like those that saved the pretrial detention statute in *Salerno*. *Id.* at 691. The Court addressed those due process concerns by construing the statute to permit detention only for a "presumptively reasonable" period of six months, after which "once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." *Id.* at 700-701. In so holding, the Court applied due process standards from prior civil detention cases outside the immigration context, including *Jackson*, *Salerno*, *Foucha*, and *Hendricks*. *See id.* at 690-691. Nowhere did the Court in *Zadvydas* suggest that the protected liberty interest in avoiding physical confinement, or the amount of process due before depriving someone of that interest, was any different in the immigration context—even for persons already ordered removed—compared to those earlier cases. *See Demore*, 538 U.S. at 552-554 (Souter, J., dissenting).

The Court has also affirmed these standards in the years since *Zadvydas* and *Demore*. In *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), this Court considered the process necessary to detain a U.S. citizen as an enemy combatant. A majority of the Court agreed that "this Court consistently has recognized that an individual challenging his detention may not be held at the will of the Executive without recourse to some proceeding before a neutral tribunal to determine whether the Executive's asserted justifications for that detention have basis in fact and warrant in law." *Id.* at 528 (plurality opinion) (citing *Zadvydas*, 533 U.S. at 690; *Addington*,

441 U.S. at 425-427).[7] While recognizing "the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States," the majority nevertheless concluded that Hamdi was entitled to notice of the government's asserted basis for detention, and "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Hamdi*, 542 U.S. at 531, 533 (plurality opinion); *see also id.* at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (noting agreement that "someone in Hamdi's position is entitled at a minimum to notice of the Government's claimed factual basis for holding him, and to a fair chance to rebut it before a neutral decision maker").[8]

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[7] The plurality in *Hamdi* concluded that if a person was determined to be an enemy combatant after sufficient process, detention would be authorized under the post-September 11, 2001 Authorization for Use of Military Force ("AUMF"). 542 U.S. at 517. Justices Souter and Ginsburg agreed as to the minimum process necessary for determining enemy combatant status, but disagreed that the AUMF would authorize Hamdi's detention even if he were an enemy combatant. *Id.* at 540-541 (Souter, J., concurring in part and dissenting in part).

[8] The distinction drawn in *Hamdi* between the process required for *initial* detention on the battlefield and the process required for continued detention away from the fight echoes the distinction Mr. Kim raised in *Demore*. The parties in *Hamdi* agreed that "initial captures on the battlefield need not receive the process" the plurality opinion described, and that such process was "due only when the determination is made to *continue* to hold those who have been seized." *Hamdi*, 542 U.S. at 534 (emphasis in original). Likewise, in *Demore*, Mr. Kim's challenge was not to his *initial* arrest by immigration authorities, but rather his continued detention by the government without a bond hearing. *See Demore*, 538 U.S. at 514 n.2 ("[Respondent] does not challenge INS's authority to take him into custody after he finished serving

Although *Hamdi* concerned the detention of a U.S. citizen on U.S. soil, 542 U.S. at 509, nothing in *Hamdi* suggested that its due process analysis would not apply to *noncitizens* detained on U.S. soil. To the contrary, in discussing the procedural protections required for detention, *see id.* at 528-534, the Court repeatedly relied on prior cases, including *Zadvydas*, that discussed the process due before locking up "persons" or "individuals," not only "citizens." *See, e.g.*, *Zadvydas*, 533 U.S. at 693; *Addington*, 441 U.S. at 419-420 ("The question in this case is what standard of proof is required by the Fourteenth Amendment to the Constitution in a civil proceeding brought under state law to commit an individual involuntarily for an indefinite period to a state mental hospital."); *Mathews* v. *Eldridge*, 424 U.S. 319, 332 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause[.]"); *Foucha*, 504 U.S. at 79 ("Due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed."); *Salerno*, 481 U.S. at 755 (permitting "detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing" to be dangerous).

Moreover, immigration detention leads to ancillary deprivations of other constitutionally protected liberties. As the court of appeals ruled in this case, detained immigrants are isolated from their families and are unable to work, creating economic hardship for themselves and their families, which often include U.S. citi-

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his criminal sentence. His challenge is solely to Section 1226(c)'s absolute prohibition on his release from detention, even where, as here, the INS never asserted that he posed a danger or significant flight risk.").

zens. Pet. App. 20a-21a. Furthermore, detained immigrants are at risk of prison-related harms, including sexual assault and lack of adequate medical care. J.A. 30(¶62); Human Rights Watch, *US: Immigration Detention Neglects Health* (Mar. 17, 2009), https://www.hrw.org/news/2009/03/17/us-immigration-detention-neglects-health. All of these harms implicate constitutionally protected liberty interests. *See, e.g., Landon* v. *Plasencia*, 459 U.S. 21, 34 (1982) ("the right to rejoin [one's] immediate family [is] a right that ranks high among the interests of the individual" (citing *Moore* v. *City of East Cleveland*, 431 U.S. 494, 499, 503-504 (1977) (plurality opinion))); *Youngberg* v. *Romeo*, 457 U.S. 307, 315 (1982) ("the right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause").

These additional deprivations increase the need for individualized process before imposing detention. *See Hamdi*, 542 U.S. at 529 (plurality opinion) (process due is determined by "weighing 'the private interest that will be affected by the official action' against the Government's asserted interest" (quoting *Mathews* v. *Eldridge*, 424 U.S. at 335)). Indeed, this Court has required individualized process where a state seeks to deprive an individual of rights less weighty than physical liberty. *See, e.g., Santosky* v. *Kramer*, 455 U.S. 745, 748 (1982) (due process requires proof by clear and convincing evidence prior to termination of parental rights).[9] At least as much process is required before locking someone up for months or years.

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[9] *See also, e.g., Goldberg* v. *Kelly*, 397 U.S. 254, 268 (1970) (failure to provide in-person hearing prior to termination of welfare benefits was "fatal to the constitutional adequacy of the procedures"); *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1,

B. The *Demore* Court's Creation Of A Different Constitutional Principle For Physical Liberty Of Immigrants Was Erroneous And Should Be Overruled

The Court in *Demore* departed from the due process principles discussed above, even on the facts the Court believed were before it. As Justice Souter noted in dissent, "[d]etention [under the statute] is not limited to dangerous criminal aliens or those found likely to flee, but applies to all aliens claimed to be deportable for criminal convictions, even where the underlying offenses are minor," such as "possession of stolen bus transfers" or "issuance of a bad check." *Demore*, 538 U.S. at 558 (Souter, J., dissenting). Nor is Section 1226(c) detention "limited by the kind of time limit imposed by the Speedy Trial Act, and while it lasts only as long as the removal proceedings, those proceedings have no deadline and may last over a year." *Id.* Furthermore, under the government's reading of the statute, "Section 1226(c) neither require[d] nor permitt[ed] an official to determine whether [an immigrant's] detention was necessary to prevent flight or danger." *Id.* Thus, *Zadvydas*—and the precedent on which it rested—supported Mr. Kim's claim for individualized process to justify detention. *Id.* at 554.

In attempting to distinguish *Zadvydas*, the Court in *Demore* first stated that, because *Zadvydas* concerned post-final-order immigrants for whom removal

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16 (1978) (due process requires, at minimum, opportunity for utility clients to argue their cases prior to termination of service); *Califano* v. *Yamasaki*, 442 U.S. 682, 696 (1979) (in-person hearing required for recovery of excess Social Security payments where beneficiary was at fault because "written review hardly seems sufficient to discharge the Secretary's statutory duty to ... assess the absence of 'fault'").

was "'no longer practically attainable,'" that detention no longer served its immigration purposes, whereas pre-final-order detention did. *Demore*, 538 U.S. at 527 (quoting *Zadvydas*, 533 U.S. at 690). That distinction was flawed; as the Court in *Zadvydas* noted, post-final-order detention was designed to serve the same purposes as Section 1226(c) detention: "preventing flight" and "protecting the community." 533 U.S. at 690-691. And as Justice Souter explained, Section 1226(c) detention of individuals with meritorious challenges to removal no more serves the government's purposes than the detention of petitioners in *Zadvydas* whose removal was no longer reasonably foreseeable. *See Demore*, 538 U.S. at 561 (dissenting opinion).

Moreover, determining what process is due necessarily requires a "balance" between the individual's liberty interests and the government's stated purpose. *Mathews* v. *Eldridge*, 424 U.S. at 47. Thus, even if it were true that the detention in *Demore* served its purpose while the detention in *Zadvydas* did not, due process still required the Court to weigh the competing interests to determine whether detention without individualized process was justified. The closest the *Demore* majority came to performing such a balancing was to point to the evidence that Congress considered when enacting Section 1226(c), which supposedly showed that "permitting discretionary release of aliens pending their removal hearings would lead to large numbers of deportable criminal aliens skipping their hearings and remaining at large in the United States unlawfully." 538 U.S. at 528. However, as Justice Souter pointed out, the relevant evidence before Congress—in particular, a Senate report showing that 20% of nondetained "criminal aliens" failed to appear—recognized that detention decisions were being made

"*not* on the ground of likelihood of flight or dangerousness, but 'in large part, according to the number of beds available in a particular region.'" *Id.* at 563 (dissenting opinion) (emphasis added). Thus, the data considered in *Demore* was premised on the fact that bond determinations were not made based on flight risk or danger, but were motivated by resource-based considerations. Release decisions made under such circumstances say nothing about whether the government's interests outweigh an individual's liberty interest when an IJ determines that the individual is neither a danger nor a flight risk. *Id.*

The Court in *Demore* also cited a study discussing flight rates for immigrants who had *already* been ordered removed. 538 U.S. at 519, 521. But such a report could not have shed any light on whether mandatory detention was justified for people who were still fighting removal, as respondents here are—and Mr. Kim was as well. *Id.* at 541-543 (Souter, J., dissenting); *see supra* n. 4. Indeed, the Court had before it evidence that LPRs like Mr. Kim were more likely to prevail in their removal proceedings. *Id.* at 567-568.

The Court in *Demore* also ruled that detention under Section 1226(c) was of a "much shorter duration" than the "'indefinite' and 'potentially permanent'" detention in *Zadvydas*. 538 U.S. at 528 (quoting *Zadvydas*, 533 U.S. at 690-691). But the premise of "much shorter" detention depended on averaging together detention periods for individuals challenging removal (like Mr. Kim) with detention periods for individuals who did not challenge removal at all, which the government conceded at the time represented the "vast majority" of cases. *Id.* at 567-568 (Souter, J., dissenting). Thus, to the extent *Demore* conducted any balancing of individual and government interests, the scales

were artificially tipped in the government's favor. Moreover, while *Zadvydas* happened to address a type of civil detention that could be permanent, the logic of *Zadvydas* was based on precedent that applied to civil detention more broadly, even where the detention was temporally limited. *See, e.g.*, *Salerno*, 481 U.S. at 750-752 (hearing required for pretrial detention even though Speedy Trial Act limited detention period).

Demore also invoked the Court's statement in *Mathews* v. *Diaz* that "'[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.'" *Demore*, 538 U.S. at 521 (quoting *Mathews* v. *Diaz*, 426 U.S. 67, 79-80 (1976)). But as the very next sentence in *Diaz* shows, the Court was referring to the government's unique power to expel immigrants from the country: "The exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal Government's power to regulate the conduct of its own citizenry." 426 U.S. at 80. Nothing in *Diaz* suggested that Congress's plenary power over *immigration*—the authority to admit noncitizens to and remove them from the Nation's territory—amounted to a plenary power over the physical liberty of *immigrants*. Indeed, *Zadvydas* decisively rejected any such notion by emphasizing the applicability of the Due Process Clause to noncitizens and by relying on civil detention precedent from the non-immigration context. 533 U.S. at 690-694.

Demore was also incorrect to rely on *Carlson* v. *Landon*, 342 U.S. 524 (1952), and *Reno* v. *Flores*, 507 U.S. 292 (1993). *Demore*, 538 U.S. at 523-526. In *Carlson*, unlike in *Demore*, there had already been an individualized finding that each of the petitioners was a "menace to the public interest." 342 U.S. at 541. More-

over, the statute at issue in *Carlson*, the Internal Security Act of 1950, specifically targeted individuals who were engaged in activities or who were members of organizations that Congress thought were especially dangerous; for example, the Act targeted Communists based on Congress's "understanding of [Communists'] attitude toward the use of force and violence ... to accomplish their political aims." 342 U.S. at 527 n.5, 541. To the extent *Carlson* was relevant at all, it reinforced the principle that civil detention may apply only to a narrow class of persons (*see supra* pp. 20-21), whereas Section 1226(c) sweeps up individuals with no record of dangerous activity whatsoever. *Flores* was also off-point; the Court there rejected a claimed right of immigrant *juveniles* to be released to an alternative private custodian when no parent was available, because such a right was not fundamental. 507 U.S. at 302, 305 ("[I]mpairment of a lesser interest ... demands no more than a 'reasonable fit' between governmental purpose ... and the means chosen to advance that purpose."). *Flores* did not involve the fundamental right to physical liberty; indeed, the children at issue in *Flores* were eligible for bond hearings. *Id.* at 308-309.

Put simply, *Demore*'s constitutional analysis was not consistent with this Court's unbroken line of decisions applying the Due Process Clause, and it should be overruled.

C. *Stare Decisis* Does Not Save *Demore*

The doctrine of *stare decisis* does not prevent the Court from reconsidering and overruling *Demore*.

"Although 'the doctrine of *stare decisis* is of fundamental importance to the rule of law[,] ... [o]ur precedents are not sacrosanct.' ... '[W]e have overruled prior

decisions where the necessity and propriety of doing so has been established.'" *Hurst* v. *Florida*, 136 S. Ct. 616, 623 (2016) (quoting *Ring* v. *Arizona*, 536 U.S. 584, 602 (2002)). Although the Court requires some "special justification" to depart from precedent, *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000), the existence of such a justification rests on a consideration of multiple factors, *see Montejo* v. *Louisiana*, 556 U.S. 778, 792 (2009). The factors to be considered are "workability, ... the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Id.* at 792-793 (citing *Pearson* v. *Callahan*, 555 U.S. 223, 232 (2009)). The Court has also considered whether the "great weight of scholarly opinion has been critical" in determining whether to overrule a prior case, *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 47-48 (1977), and whether the prior decision relied on a factually flawed premise, *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 399 (1937). These considerations all weigh in favor of overruling *Demore*.

From a *stare decisis* perspective, *Demore* is a relatively recent decision. *See, e.g., Montejo*, 556 U.S. at 793 (overruling a decision partially on the basis that it is "only two decades old"). As explained above, *Demore* represents an unjustified deviation from an otherwise unbroken line of due process cases requiring individualized procedures to determine whether civil detention is justified. Accordingly, this Court's observation in *Adarand Constructors, Inc.* v. *Pena* is apt:

> Remaining true to an "intrinsically sounder" doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent error and would likely

> make the unjustified break from previously established doctrine complete.

515 U.S. 200, 231 (1995); *see also id.* at 233-234 (noting that, because a more recent case "itself *departed* from our prior cases—and did so quite recently ... refusing to follow" that case "do[es] not depart from the fabric of the law" but "restore[s] it" (emphasis in original)).

In addition, *Demore* has been "consistently criticized by commentators," *Adarand*, 515 U.S. at 232, which further counsels overruling it. For example, *Demore* has been described as "significant—and troubling because its application of the plenary power doctrine to the detention of permanent resident aliens runs counter to two important undercurrents of the Court's immigration jurisprudence: the treatment of immigration detention as a procedural issue governed by normal due process principles, and the understanding that permanent resident aliens are entitled to robust constitutional protection." *The Supreme Court, 2002 Term: Leading Cases: i. Constitutional Law: d. Due Process*, 117 Harv. L. Rev. 287, 291 (2003); *see also* Lindsay, *Immigration As Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 Harv. C.R.-C.L. L. Rev. 1, 3, 55 (2010) (describing *Demore*'s invocation of the plenary power as "constitutionally and morally striking"); Moore, *Aliens and the Constitution*, 88 N.Y.U. L. Rev. 801, 862 (2013) (describing *Demore* as "remarkable insofar as it is the first time that the Supreme Court has upheld categorical preventive detention outside of a wartime context" and noting that "decisions in *Zadvydas* and [*Demore*] have arguably sent mixed signals").

Demore has also proven unworkable in the lower courts. Every circuit to have considered the question

has determined that there must be *some* constitutional limit on mandatory detention under Section 1226(c), but those courts have disagreed on what the limit is. *See Sopo*, 825 F.3d at 1212-1213 (collecting cases); Pet. 29. This Court has found such confusion among lower courts to be grounds for revisiting prior precedent. *See, e.g., Johnson* v. *United States*, 135 S. Ct. 2551, 2560, 2562 (2015) (overruling precedent upholding residual clause of Armed Career Criminal Act where clause had "created numerous splits among the lower federal courts" and "the experience of the federal courts [left] no doubt about the unavoidable uncertainty and arbitrariness of adjudication").

The government cannot claim any significant reliance interest on *Demore*. As discussed above, alternatives to detention and risk assessment tools can effectively serve the government's goals of protecting the public and preventing flight. *See supra* pp. 13-18. Moreover, due process would require only that immigrants potentially subject to detention under Section 1226(c) should have an opportunity to contest the need for detention. Given that the government routinely holds such bond hearings for other immigrants challenging detention, it cannot plausibly claim to have "relied" on *Demore* in any cognizable way.[10]

In addition, "the force of *stare decisis* is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections." *Alleyne* v. *United States*, 133 S. Ct. 2151, 2163 n.5 (2013). *Demore* most assuredly concerns "procedural rules that implicate

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[10] Permitting immigrants who are not dangerous or a flight risk to be released on bond or other conditions can actually *save* money for the government, given the high cost of detaining each individual. J.A. 529 (Fig. 2); J.A. 88-89 (Table 18).

fundamental constitutional protections"; *Zadvydas* clearly recognized that an immigrant's interest in physical freedom was a fundamental interest protected by the Constitution, 533 U.S. at 690, and nothing in *Demore* suggests otherwise.

Finally, this Court "would be particularly loath to uphold an unconstitutional result in a case that is so easily distinguished from the decisions that arguably compel it." *Arizona* v. *Gant*, 556 U.S. 332, 348 (2009). Given the significant errors in the factual assumptions that underlay the Court's decision in *Demore*, the Court should at the very least decline to apply *Demore* to this case. Neither before nor since *Demore* has this Court endorsed the type of detention without individualized process that the government seeks to impose here; to the contrary, this Court has consistently rejected it.

Demore was inconsistent with the Court's settled due process doctrine and should be overruled. At the very least, it should be treated as nothing more than a narrow exception that applies *only* to the facts that the Court erroneously believed were before it: brief mandatory detention at the outset of removal proceedings. Either approach warrants rejection of the government's position in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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RECORD AND BRIEF

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In The
Supreme Court of the United States

DAVID JENNINGS, et al.,

Petitioners,

v.

ALEJANDRO RODRIGUEZ, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE FOR AMERICANS FOR IMMIGRANT JUSTICE, ET AL. IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

Amici curiae are 58 community groups, immigrant rights organizations, law clinics, and legal service providers whose members and clients face the severe consequences of prolonged detention without bond hearings.[1] We have a profound interest in ensuring that the voices of our members and clients are included in the resolution of this case. As explained below, their stories are not outliers. Rather, they are emblematic of an unjust system where access to constitutionally adequate bond hearings is far too arbitrary.

Detailed statements of interest for each organization are appended after the conclusion of this brief.

SUMMARY OF ARGUMENT

Each year, hundreds of thousands of people undergo a complex administrative process to determine whether they will be deported or permitted to remain in the United States. Roughly half of all asylum seekers and noncitizens placed in removal proceedings

[1] Amici state that no counsel for a party authored any part of this brief, and no person or entity other than amici and their counsel made a monetary contribution to the preparation or submission of this brief. Both petitioners and respondents have consented to the filing of this brief pursuant to Rule 37.3(a).

are permitted to remain.[2] Longtime lawful permanent residents receive cancellation of removal; fathers, mothers, and children fleeing persecution receive asylum; cases are terminated in light of legal errors. Decisions *not* to deport are a critical part of the fairness of the removal process. Such decisions carry out Congress's intent to maintain family unity and offer humanitarian relief through our nation's immigration laws.

The Government argues that detention is designed to facilitate the removal process. *See* Gov't Br. 33. But when detention extends from weeks to months to years without meaningful review, such detention perverts the removal process, both by punishing immigrants who will ultimately remain in the U.S. with their families, and by coercing immigrants with strong cases to forego their claims. Procedures short of bond hearings, and reliance on ad-hoc litigation, are insufficient to protect against these harms. Rather, as the stories and data discussed below demonstrate, this Court should ensure that individuals in prolonged

---

[2] Of the nearly 200,000 immigration court cases completed in FY 2015, 53.6% of cases resulted in an outcome favorable to the noncitizen, including termination, administrative closure, or the grant of relief in the case. *See* Transactional Records Access Clearinghouse, Syracuse Univ., *U.S. Deportation Outcomes by Charge*, http://trac.syr.edu/phptools/immigration/court_backlog/deport_outcome_charge.php. Immigration courts granted 48.3% of the over 17,000 asylum applications decided in FY 2015. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, ASYLUM STATISTICS FY 2011-2015 (2016), https://www.justice.gov/eoir/file/asylum-statistics/download.

detention have access to constitutionally adequate bond hearings.

ARGUMENT

I. Prolonged Detention Without A Bond Hearing Has Perverse And Arbitrary Effects On The Immigration System, Noncitizens, And Their Families.

Prolonged detention has a devastating impact on our community members and clients, and the immigration system as a whole. First, prolonged detention without a bond hearing arbitrarily punishes immigrants, many of whom will ultimately remain in the U.S. with their families. It converts brief administrative detention into an indeterminate sentence, bearing all of the direct and collateral consequences of punishment. Second, prolonged detention without a bond hearing distorts the proper functioning of the removal system. It has an adverse, coercive impact on immigrants who need time to pursue their eligibility to remain in the United States, forcing the very individuals with the strongest cases to endure the worst of the detention system or forego their claims.

A. Prolonged detention without a bond hearing arbitrarily punishes noncitizens and their families.

For many, prolonged detention is indistinguishable from an indeterminate prison sentence. An individual in prolonged detention passes months and years behind bars, in a prison jumpsuit, shackled during visitation and court; is subjected to surveillance, strip searches, and solitary confinement; and is referred to by a number.[3] A majority of immigrants placed in removal proceedings are held in county jails, subject to the same rules and conditions as people currently serving sentences for recent criminal offenses.[4] Other facilities, including those holding arriving asylum seekers at the border, are run by the same private prison companies whose poor track records on prison conditions recently led the U.S. Department of Justice to announce that it would reduce and ultimately end its

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[3] *See, e.g.*, AMNESTY INTERNATIONAL, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA (2009), http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf; NAT'L IMMIGRANT JUSTICE CENTER, HEARTLAND ALLIANCE & PHYSICIANS FOR HUMAN RIGHTS, INVISIBLE IN ISOLATION: THE USE OF SEGREGATION AND SOLITARY CONFINEMENT IN IMMIGRANT DETENTION (2012), http://static.prisonpolicy.org/scans/Invisible.pdf; HUMAN RIGHTS FIRST, JAILS AND JUMPSUITS: TRANSFORMING THE U.S. IMMIGRATION DETENTION SYSTEM – A TWO-YEAR REVIEW (2011), http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf.

[4] *End ICE's Overreliance on Unjust Immigration Detention*, NAT'L IMMIGRANT JUST. CTR., http://immigrantjustice.org/end-ices-overreliance-unjust-immigration-detention (providing breakdown of ICE detention centers at "List of Detention Centers (April 2016)").

use of private prisons to hold people accused or convicted of crimes in the Bureau of Prisons.[5]

Prolonged detention thus leads to all of the direct and collateral consequences associated with punishment. It causes longtime separation from loved ones, often across state lines with limitations on visitation and communication; the placement of children in foster care; job loss and education disruption; and the loss of savings and property, including one's home or business.[6] For an individual who will ultimately remain in the U.S., it is hard to understand what purpose prolonged detention serves, if not to punish.

For example, decorated Gulf War veteran **Warren Hilarion Joseph**[7] faced over three years in immigration detention before he won his case to remain in the U.S. and ultimately became a U.S. citizen:

> Mr. Joseph came to the United States as a lawful permanent resident from Trinidad, enlisting in the U.S. Army when he was twenty-one. He served in combat positions in the First

---

[5] Memorandum from Sally Q. Yates, Deputy Att'y Gen., to the Acting Director, Bureau of Prisons, Reducing Our Use of Private Prisons (Aug. 18, 2016), https://www.justice.gov/opa/file/886311/download.

[6] *See supra* note 3 (listing reports describing conditions and consequences of immigration detention).

[7] The facts of Mr. Joseph's case are detailed in his habeas petition and declaration. *See* Petition for Writ of Habeas Corpus, *Joseph v. Aviles*, No. 2:07-cv-02392-JLL (D.N.J. May 11, 2007); Decl. of Warren Hilarion Joseph (on file with counsel).

Gulf War, was injured in the line of duty, received commendations for his valiant service and his rescue of fellow soldiers, and was honorably discharged.

Like many other combat veterans, Mr. Joseph fell upon hard times after returning home. In 2001, Mr. Joseph was arrested for unlawfully purchasing a handgun for individuals to whom he owed money. He received a probation sentence, and with the support of his family was able to find a good job. When he moved to his mother's house and failed to inform his probation officer, however, Mr. Joseph was found guilty of violating probation and was sentenced to six months.

Little did Mr. Joseph realize that after his six-month criminal sentence was over, he would then spend three and a half years – seven times the length of his sentence – in Hudson County Correctional Facility, in Kearney, New Jersey. He vividly recalls spending his first night in immigration detention sleeping on a concrete floor before a bed was available, pressing his injured foot into the cold ground to numb the pain, wondering when he would ever get out. His wartime injury worsened over years in the jail, until he had to be hospitalized for surgery, making it difficult for him to walk.

The indignities of the jail and the uncertainty of whether he would ever be released made detention almost too much to bear. Suffering

> from post-traumatic distress disorder, Mr. Joseph felt insecure and targeted in the jail. He was deeply pained to be separated from his U.S. citizen children and family members. His mother and sister were forced to travel across state lines to see him, though the jail sometimes turned them away.
>
> Mr. Joseph was ultimately granted a form of relief called "cancellation of removal" in light of his positive equities and ties to the community, allowing him to retain his lawful permanent resident status. He recently became a U.S. citizen, and remains proud of the work he and other veterans have done to protect this country. But he will never get back the three and a half years of his life he lost to prolonged detention.

Similarly, the two-and-a-half-year period **Astrid Morataya**[8] spent in detention carried all the punitive effects of an indeterminate criminal sentence:

> A longtime lawful permanent resident, Ms. Morataya has lived in the United States since she was eight years old, after fleeing violence in Guatemala. The mother of three U.S. citizen children, Ms. Morataya was placed in removal proceedings in 2013 on the basis of a 1999 low-level drug distribution conviction for which she was sentenced to probation. She received her conviction more than a decade

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[8] The facts of Ms. Morataya's case are detailed in a declaration by her attorney. *See* Decl. of Claudia Valenzuela, Esq. of the National Immigrant Justice Center (on file with counsel).

prior to her removal proceedings, during a period in her life when she was the victim of ongoing sexual abuse, including a violent kidnapping and rape.

Ms. Morataya ultimately testified against her abuser in court, aiding in his successful prosecution. When she was placed in removal proceedings years later, she was eligible for a "U visa" based on her cooperation with law enforcement and an "inadmissibility waiver" due to her strong positive equities. She was ultimately granted this relief, and remains in the U.S. with her family to this day.

For the entirety of the two-and-a-half years it took to resolve her removal case, however, Ms. Morataya was detained at the McHenry County Jail in Woodstock, Illinois and Kenosha County Correctional Center in Kenosha, Wisconsin. Guards treated her as an inmate, and punished her as one. She was twice placed in solitary confinement, once for having a sugar packet in her uniform that she forgot to dispose of at mealtime, and once for not being ready to leave her cell because she had begun menstruating and lagged behind her cellmates while trying to secure menstrual pads.

The years of Ms. Morataya's detention also weighed heavily on her family. She missed birthdays, holidays, her youngest daughter's first day of kindergarten, and her son's high school graduation. Worst of all, she was forced to stand by when her youngest child, at five

> years of age, became the subject of a protracted and traumatic custody battle due to her detention.

The harms of prolonged detention have also been felt by asylum seekers like **Emannuel Boukari**,[9] who fled persecution and torture only to be detained for years before ultimately receiving protection from deportation:

> A young pro-democracy activist in Togo, Mr. Boukari initially came to the U.S. as a student and was subsequently deported. Upon his deportation, Mr. Boukari was detained and tortured by government forces for nearly a year before fleeing to a refugee camp in a neighboring country. He lived in the refugee camp for approximately six years until finding a job working for a local pastor and his congregation. When men in uniform appeared at the parish looking for him, Mr. Boukari collected the documents necessary to travel back to the U.S., where he had family.
>
> Once here, he asked for protection at the border. Instead, he was placed into removal proceedings, labeled an "arriving alien," and detained in Elizabeth Detention Facility, run by private prison corporation Corrections Corporation of America. Cut off from the outside

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[9] "Emmanual Boukari" is a pseudonym to protect Mr. Boukari's identity in light of the persecution he has faced. The facts of Mr. Boukari's case are detailed in a declaration by his attorney. *See* Decl. of Alexandra Goncalves-Pena, Esq. of American Friends Service Committee (on file with counsel).

> world, Mr. Boukari was re-traumatized, forced to re-live his experience of being detained in Togo. He applied for and was denied humanitarian parole[10] three times – despite his strong case, proof of identity, and family ties to the country.
>
> After two-and-a-half years of detention, Mr. Boukari was granted withholding of removal. Now living with family in Nebraska, Mr. Boukari struggles to overcome the trauma he faced.

People like Mr. Joseph, Ms. Morataya, and Mr. Boukari are not unique within our immigration system. For removal cases that are not resolved quickly, it is not uncommon for administrative proceedings to last years, and for individuals to win their cases.

At least two sources of data confirm this. First is the data in *Jennings v. Rodriguez* itself. *Rodriguez* class members – individuals who have been detained for at least 180 days while their removal proceedings remain pending – spent an average of 404 days in detention pursuing their cases.[11] Ninety-seven percent of 235(b) subclass members pursued asylum, and two thirds won.[12] Seventy percent of 236(c) subclass members pursued applications for relief from removal that would avoid the entry of a removal order, and won their

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[10] *See* Point II.B, *infra*.

[11] J.A. 71-73, tbls. 2 & 3.

[12] J.A. 98, tbl. 28.

cases at a rate of more than five times higher than immigrant detainees generally.[13]

Second is the data from the New York Immigrant Family Unity Project (NYIFUP), reporting the outcome and characteristics of individuals subject to prolonged detention who received bond hearings under *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015). The first public defender system for detained immigrants in the United States, NYIFUP ensures representation for indigent immigrants whose cases are heard at Varick Immigration Court in New York City.[14]

According to an analysis of *Lora* bond hearings for NYIFUP clients conducted in a nine-month period, individuals who received *Lora* bond hearings – i.e., individuals whose mandatory detention had exceeded or was approaching six months – were detained an average of 320 days.[15] While the *Lora* decision is too recent for removal case outcomes to be known, based on available data, 66% of individuals who received *Lora* bond hearings pursued discretionary relief from

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[13] J.A. 95-96, 135, tbls. 23, 25-26, 38.

[14] *See New York Immigrant Family Unity Project*, BRONX DEFENDERS, http://www.bronxdefenders.org/programs/new-york-immigrant-family-unity-project/.

[15] *See* Vera Institute of Justice, Analysis of *Lora* Bond Data: New York Immigrant Family Unity Project (NYIFUP) 1 (Oct. 14, 2016), http://www.law.nyu.edu/sites/default/files/upload_documents/Vera%20Institute_Lora%20Bond%20Analysis_Oct%20%202016.pdf.

removal, withholding, or protection under Convention Against Torture.[16]

Thus, for many of our community members and clients, "civil immigration detention" is a cruel misnomer. The prolonged nature of their detention without a bond hearing turned brief, administrative detention into lengthy, punitive incarceration.

B. Prolonged detention without a bond hearing distorts the proper functioning of the immigration system.

The Government's repeated references to our community members and clients as "arriving and criminal aliens" prone to engage in "dilatory tactics" would have one believe that prolonged detention is the fault of dangerous noncitizens seeking to delay their inevitable deportation through the pursuit of various, often weak, claims. Gov't Br. 11, 24, 40-42.

Actual data and detainee experiences, as discussed above, paint a very different picture. They show that many prolonged detainees are longtime residents and asylum seekers with strong claims and ties to the community who simply seek their day in court.[17] Prolonged detention without a bond hearing forces many

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[16] *Id.*

[17] Of the NYIFUP clients who received *Lora* bond hearings, 69% are lawful permanent residents, and at least 79% have a spouse and/or children in the U.S. *See id.* at 4. *Lora* bond hearing recipients have lived in the U.S. for an average of twenty-two years. *Id.* at 3. In *Rodriguez*, the Ninth Circuit similarly noted

of these individuals to give up their valid claims in order to regain their freedom.

Consider the story of **Arnold Giammarco**,[18] an Army veteran and lawful permanent resident who agreed to his own deportation because of the terrible impact of detention:

> Mr. Giammarco was a lawful permanent resident from Italy who arrived in the United States when he was four years old and had lived with his family in Connecticut for approximately fifty years before being detained by immigration officials. Mr. Giammarco served nearly seven years in the U.S. Army and the Connecticut National Guard, achieving the rank of Sergeant, and was honorably discharged. He applied for naturalization while a service-member but his application was never adjudicated. After his military service and a divorce, Mr. Giammarco suffered emotional difficulties, struggled with drug addiction, and spent nights in homeless shelters.
>
> Yet following a series of petty offenses and drug possession convictions, Mr. Giammarco

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that many *Rodriguez* class members had significant ties to the community, including permanent residency and U.S. family members. *See Rodriguez v. Robbins*, 804 F.3d 1060, 1072 (9th Cir. 2015).

[18] The facts of Mr. Giammarco's story are detailed in Complaint, *Giammarco v. Beers*, No. 3:13-cv-01670-VLB (D. Conn. Nov. 12, 2013), https://www.law.yale.edu/system/files/documents/pdf/Clinics/vlsc_giammarco_complaint.pdf/. *See also* Decl. of Sharon Giammarco (on file with counsel).

rebuilt his life. He began working at McDonalds and was promoted several times, becoming a nighttime production manager. He married his U.S. citizen partner Sharon, and supported her efforts to become an addiction counselor. Together they had a daughter. Mr. Giammarco worked nights, took care of his daughter during the day, and often spent weekends visiting his parents and siblings.

In the spring of 2011, nearly seven years after his last removable conviction, armed immigration agents detained Mr. Giammarco for removal proceedings. As his detention stretched from weeks to months, it had a devastating impact on his family. Without her husband's income, Sharon was forced to work seventy hours a week and move in with her sister. Mr. Giammarco's mother liquidated her savings to pay for legal fees. Though the jail's Chief of Immigration Services described Mr. Giammarco as a "model detainee," on visits Sharon and their daughter were separated from Mr. Giammarco by a glass partition. During his daughter's formative moments of life, he was unable to hold her.

After eighteen months, the anguish of imprisonment forced Mr. Giammarco to accept deportation to Italy. Years later, a district court judge ruled that his naturalization petition remains valid, and his family and community continue to fight for his return home to the U.S. Had he received a bond hearing after six months of detention, his military service, rehabilitation, and community ties could have

> been considered as factors meriting his release. Instead, he was forced to choose between his freedom and the possibility of winning his case.

Juan Santos,[19] a labor trafficking victim, gave up on his case after initially winning before an Immigration Judge because he could not bear continued detention:

> A victim of labor trafficking, Mr. Santos worked as a migrant farmworker for an agricultural enterprise in Florida under conditions of modern-day slavery. Beaten and periodically locked in a box truck, Mr. Santos testified against his traffickers in federal court. With his testimony, federal officials successfully prosecuted his employers for labor trafficking.
>
> After Mr. Santos testified, however, immigration officials detained him and charged him with removability on the basis of several minor convictions he received during and in the aftermath of the labor trafficking. More than six months passed before an immigration judge granted Mr. Santos withholding of removal based on evidence he would be persecuted if deported to Mexico, where some of the powerful individuals he testified against had significant ties.

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[19] "Juan Santos" is a pseudonym to protect Mr. Santos's identity in light of his persecution-based claim. The facts of Mr. Santos's case are detailed in a declaration by his attorney. *See* Decl. of Karen Winston, Esq. (on file with counsel).

> But immigration officials then appealed the decision, and the Board of Immigration Appeals ("B.I.A.") remanded the case. On remand, the immigration judge denied Mr. Santos's application. Mr. Santos filed an appeal based on strong claims of error, but after more than a year of detention at Baker County Jail in Florida, ultimately decided that he could not bear to remain detained. He withdrew his appeal and agreed to his deportation.
>
> Mr. Santos was later awarded a damages judgment from a civil labor trafficking lawsuit, but because his counsel could not locate him after his removal to Mexico, he never received his award.

The story of **Brayan Fernandez**[20] also highlights the negative impact of prolonged detention on individuals who have strong claims to remain in the U.S.:

> Mr. Fernandez is a lawful permanent resident from Mexico who was detained and placed into removal proceedings in 2015, several years after two convictions stemming from a robbery offense for which he had been arrested when he was a young man. By the time he was detained, Mr. Fernandez had changed his life, had a stable job, and was supporting his family. Mr. Fernandez was eligible for relief from removal through an "adjustment

[20] "Brayan Fernandez" is a pseudonym to protect his family's privacy. The facts of Mr. Fernandez's case are detailed in a declaration by his attorney. *See* Decl. of Paige Austin, Esq. of the Bronx Defenders (on file with counsel).

of status" application and inadmissibility waiver, which first required the federal government to approve an "I-130" visa petition by his U.S. citizen wife, recognizing their family relationship as a basis for adjustment.

The process dragged on, however, for months. Detention separated him from his wife, who was pregnant, and his two young U.S. citizen children. After he missed the birth of his son, Mr. Fernandez grew disheartened and depressed. His wife attended all of his court appearances and hoped that the case would move more quickly. When, seven months into his detention, Mr. Fernandez accepted a deportation order rather than remain detained, his wife ran from the courtroom in tears. Mr. Fernandez was deported in November 2015. His I-130 visa petition was approved one month later.

Prolonged detention has an adverse, coercive impact on the immigration system as a whole. Individuals like Mr. Giammarco, Mr. Santos, and Mr. Fernandez had strong claims to remain in the U.S. But the length and indeterminate nature of their detention short-circuited the process.

II. Current Administrative Procedures Fail To Protect Noncitizens From Unreasonable Deprivations Of Liberty Caused By Prolonged Detention Without A Bond Hearing.

The flawed administrative procedures currently available to some detainees – "*Joseph* hearings" and humanitarian parole – fall far short of the process individuals in prolonged detention would receive through a bond hearing. Neither a *Joseph* hearing nor humanitarian parole offers a meaningful way to challenge prolonged detention because neither involves a hearing on flight risk and dangerousness before a neutral decisionmaker.

A. *Joseph* hearings fail to prevent the prolonged detention of individuals with meritorious immigration cases.

A *Joseph* hearing is not a bond hearing. It does not address flight risk or dangerousness. Instead, it is a hearing in which a detainee may present legal arguments that she is not properly included in the mandatory detention statute. *In re Joseph*, 22 I. & N. Dec. 799, 806 (B.I.A. 1999). To prevail at a *Joseph* hearing, an individual must establish that the government "is substantially unlikely to establish the charge of deportability" at issue. *Id.* Under this extraordinary burden, the vast majority of *Joseph* hearings are resolved in favor of the government. *See* Julie Dona, *Making Sense of "Substantially Unlikely": An Empirical Analysis of the* Joseph *Standard in Mandatory Detention Custody*

Hearings, 26 GEO. IMMIGR. L.J. 65, 72 (2011) (finding that nearly ninety percent of *Joseph* hearing appeals result in continued detention); *see also Tijani v. Willis*, 430 F.3d 1241, 1246 (9th Cir. 2005) (Tashima, J., concurring) (*Joseph* standard "not only places the burden on the defendant . . . it makes that burden all but insurmountable").

The case of **Sayed Omargharib**[21] illustrates how a *Joseph* hearing fails to protect meritorious litigants from years of mandatory detention:

> Mr. Omargharib was a lawful permanent resident for twenty-eight years and a successful hairdresser in Washington, D.C. for over ten years when he was detained. He was charged as a removable "aggravated felon" due to a larceny conviction for taking two pool cues following a dispute with an opponent in a local pool league. Mr. Omargharib served no jail time for his conviction. But he spent nearly two years in immigration detention before he was released and his removal case was terminated.
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> After five months of detention, the immigration court finally held a *Joseph* hearing for Mr. Omargharib, but rejected his arguments that his conviction was not an aggravated felony under correct application of the law and ordered his deportation.

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[21] The facts of Mr. Omargharib's case are specified in *Omargharib v. Holder*, 775 F.3d 192 (4th Cir. 2014). *See also* Decl. of Steffanie Lewis, Esq. (on file with counsel).

> In 2014, the U.S. Court of Appeals for the Fourth Circuit ultimately agreed with the argument Mr. Omargharib had advanced at his *Joseph* hearing nearly two years prior, holding that his conviction was not an aggravated felony. That decision confirmed that Mr. Omargharib had never been deportable – or detainable – at all.
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> Upon his release Mr. Omargharib had lost both his home and means of supporting himself. Unable to satisfy business expenses and child support while detained and unemployed, his credit was destroyed. He missed his son's high school graduation and the two became estranged. In Mr. Omargharib's prolonged absence from the community, his clientele left permanently for other salons and he was unable to replace them. Now homeless, Mr. Omargharib is temporarily sleeping in a friend's basement in Virginia. He still plans on applying for citizenship within the year.

The over three-year detention of **Lorenzo Carrillo**,[22] meanwhile, shows how *Joseph* hearings do not even offer *U.S. citizens* protection from prolonged mandatory detention:

> Mr. Carrillo became a lawful permanent resident after being brought to the United States at seven years old. Growing up in California,

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[22] "Lorenzo Carrillo" is a pseudonym to protect Mr. Carrillo's privacy. The facts of Mr. Carrillo's case are detailed in a declaration by his attorney. *See* Decl. of Holly Cooper, Esq. of the University of California Davis School of Law Immigration Law Clinic (on file with counsel).

he made close friends with his classmates and cared for his younger brother while his parents worked. When he was seventeen years old, his mother naturalized, automatically making him a U.S. citizen.

In 2006, Mr. Carrillo was erroneously detained and placed into removal proceedings for a firearm possession conviction. He filed two *Joseph* motions, presenting evidence of his claim to U.S. citizenship. Each time, the Immigration Judge rejected his arguments, even consolidating his decision on the second *Joseph* motion with his order of removal.

After three years of detention, a federal district court recognized that Mr. Carrillo was indeed a U.S. citizen. Only then did immigration authorities release him. His two *Joseph* hearings were meaningless to him.

B. The arbitrary exercise of parole authority fails to prevent the prolonged detention of asylum seekers and lawful permanent residents.

Humanitarian parole is no replacement for a bond hearing. It offers no access to a neutral decisionmaker and is plagued by inconsistent administration.

Humanitarian parole decisions are made by various, dispersed agents within the U.S. Department of Homeland Security, the same agency that detains and pursues removal against noncitizens in the first place. When exercising this power, each immigration agent

makes a judicially unreviewable decision as to "whose continued detention is not in the public interest" based on her own interpretation of that interest. 8 C.F.R. § 212.5(b)(5). In theory, parole is favored for certain groups, including asylum seekers who pass a credible fear interview. *See* U.S. IMMIGRATION AND CUSTOMS ENF'T, U.S. DEP'T OF HOMELAND SEC., PAROLE OF ARRIVING ALIENS FOUND TO HAVE A CREDIBLE FEAR OF PERSECUTION OR TORTURE 6 (2009), https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf. In practice, however, parole determinations are much more arbitrary.

Data shows, for example, that parole grants for asylum seekers who passed a credible fear interview have dramatically decreased from eighty percent in 2012 to forty-seven percent in 2015. HUMAN RIGHTS FIRST, LIFELINE ON LOCKDOWN: INCREASED U.S. DETENTION OF ASYLUM SEEKERS 13 (2016), http://www.humanrightsfirst.org/sites/default/files/Lifeline-on-Lockdown_0.pdf. Those figures are consistent with a national survey of attorneys working in immigration detention centers conducted in 2016, which found that ninety percent reported denials of parole when eligibility criteria had been established. *Id.* at 14. Such statistics refute the government's unsupported claim that asylum seekers who pass a credible fear interview are "ordinarily released" on parole. Gov't Br. 14.

The stories below illustrate how parole fails to protect asylum seekers and lawful permanent residents with meritorious claims for relief from prolonged detention:

"Starting at age 17, **Ahilan Nadarajah**[23] was repeatedly tortured in Sri Lanka." *Nadarajah v. Gonzales*, 443 F.3d 1069, 1071 (9th Cir. 2006). After arriving to the United States in search of asylum, he endured almost four and a half years of mandatory detention before winning his claim. Now a U.S. citizen, his requests for parole were repeatedly rejected.

Targeted as a member of a minority ethnic group in Sri Lanka, Mr. Nadarajah fled brutal beatings inflicted by the Sri Lankan army. He sought protection from the U.S. in 2001 but was detained as an "arriving alien." ICE initially offered to parole Mr. Nadarajah out of detention on a $20,000 bond. Because he could not pay the bond, Mr. Nadarajah requested that it be lowered on three separate occasions. Each request was denied, and the parole offer was eventually rescinded without notice.

A year and a half into his mandatory detention, Mr. Nadarajah's case was first heard before an immigration judge. Twice, Mr. Nadarajah was granted asylum; twice, the government appealed. After his second asylum grant, Mr. Nadarajah presented two more requests for parole, both denied.

He then filed a habeas petition in the District Court for the Southern District of California. Mr. Nadarajah was finally ordered released by

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[23] The facts of Mr. Nadarajah's case are described in *Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006). *See also* Decl. of Ahilan Arulanatham, Esq. of the American Civil Liberties Union of Southern California (on file with counsel).

> the Ninth Circuit in March 2006, four years and five months after his placement in mandatory detention. The Court of Appeals found that ICE had abused its discretion by denying parole for reasons that were neither facially legitimate nor bona fide, based on facially implausible evidence. Today, Mr. Nadarajah is a U.S. citizen.

The story of **Maria Alvarez**,[24] illustrates how parole is arbitrarily refused to similarly situated individuals:

> Mrs. Alvarez fled Mexico with her husband, son, and daughter after a criminal organization began extorting the family for "protection money" – a promise not to harm them as long as they continued to pay. When Mrs. Alvarez's husband lost his job, the family missed a payment and her son and daughter were beaten. Aware that state authorities worked in collaboration with the criminal organization, all four family members sought asylum by presenting themselves at the U.S. border.
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> Immigration officers separated them, sending Mrs. Alvarez's husband, son, and daughter to different detention centers in California and detaining Mrs. Alvarez alone in Arizona. All three of Mrs. Alvarez's family members were then released and relocated to Virginia to live

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[24] "Maria Alvarez" is a pseudonym to protect Mrs. Alvarez's identity in light of her persecution-based claims. The facts of her case are detailed in a declaration by an attorney familiar with the case. *See* Decl. of Laura St. John, Esq. of the Florence Immigrant and Refugee Rights Project (on file with counsel).

with family members. Yet despite the substantially similar bases for each family member's asylum claims, Mrs. Alvarez alone remained in detention, her two parole requests denied.

Mrs. Alvarez's first parole request included letters from a U.S. citizen family member pledging a fixed residence for her, evidence of her husband's kidney disease and her role as his primary caregiver, and evidence of Mrs. Alvarez's own cardiac and hypertension medical problems, supported by a professional medical evaluation. Her second request included letters detailing how her health had deteriorated in detention, a letter from her husband's doctor attesting to his worsening medical condition without Mrs. Alvarez's care, a letter from the immigration lawyer representing Mrs. Alvarez's family in Virginia, committing to also represent Mrs. Alvarez if she were released, and letters from Mrs. Alvarez's family documenting the hardship her detention had placed on them.

Because Mrs. Alvarez was detained in the Ninth Circuit, she eventually received a *Rodriguez* bond hearing. The presiding judge found that she was neither a flight risk nor danger to the community and released her on bond. Mrs. Alvarez awaits her asylum hearing in Virginia.

Mr. Nadarajah and Mrs. Alvarez both came to the U.S. seeking our protection. But asylum seekers are

not the only individuals subject to arbitrary detention under laws that apply to "arriving aliens."

The story of **Leandro Placencia de la Rosa**[25] is one of many stories of longtime lawful permanent residents[26] subjected to prolonged detention as "arriving aliens":

> Mr. Placencia became a lawful permanent resident at fourteen years old, in 1993, and has lived here ever since. His mother, two sisters, and two children are U.S. citizens, while his father and brother are also lawful permanent residents. For over ten years, Mr. Placencia worked as a taxi driver, financially supporting his children and mother, who suffers from severe arthritis.
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> After a brief trip to the Dominican Republic, Mr. Placencia was placed in removal proceedings, charged with inadmissibility based on an old drug possession conviction he had received

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[25] The details of Mr. Placencia's story are available in his Petition for Writ of Habeas Corpus, *Placencia de la Rosa v. Shanahan*, 16-cv-3301 (S.D.N.Y. May 3, 2016). *See also* Decl. of Lara Gaffar, Esq. of Make the Road New York (on file with counsel).

[26] For example, in the same district where Mr. Placencia filed his habeas, numerous other lawful permanent residents have challenged their detention as "arriving aliens" in 2016 alone. *See, e.g.*, *Cardona v. Nalls-Castillo*, 15-cv-9866, 2016 WL 1553430 (S.D.N.Y. Apr. 14, 2016); *Perez v. Aviles*, 15-cv-5089, 2016 WL 3017399 (S.D.N.Y. May 24, 2016); *Arias v. Aviles*, 15-cv-9248, 2016 WL 3906738 (S.D.N.Y. July 14, 2016); *Chen v. Shanahan*, 16-cv-841 (S.D.N.Y. Feb. 3, 2016); *Thomas v. Shanahan*, 16-cv-5401 (S.D.N.Y. July 7, 2016); *Singh v. Shanahan*, 16-cv-6142 (S.D.N.Y. Aug. 3, 2016); *Ricketts v. Simonse*, 16-cv-6662 (S.D.N.Y. Aug. 24, 2016).

as a minor. But it was not until years later, and after a second drug possession conviction, that immigration officials detained Mr. Placencia without bond in a New Jersey county jail, using his brief trip to classify him as an "arriving alien."

Proceeding pro se, Mr. Placencia was ordered removed and transferred to Etowah County Detention Center in Alabama. As his time in detention wore on, he developed depression and hypertension.

In 2016, a community organization in New York City succeeded in reopening Mr. Placencia's removal case and in transferring him back to detention in New Jersey. Due to immigration court backlogs, however, Mr. Placencia did not receive a hearing in his reopened case until March 2016. After a habeas petition was filed, immigration officials agreed to release him, and the petition was dismissed. He was subsequently granted cancellation of removal. All told, Mr. Placencia spent twenty-two months in detention as an "arriving alien."

III. Ad Hoc Litigation Fails To Address Due Process Concerns For Individuals Whose Detention Has Already Become Prolonged.

The Government supports the use of habeas litigation as a remedy for prolonged detention of "exceptional duration." Gov't Br. 31, 46-50. But lack of legal expertise and pervasive court delays would make

such a remedy illusory for the vast majority of individuals locked away in prolonged mandatory detention.

A. The majority of detained immigrants are pro se and lack the legal expertise to seek relief through federal litigation.

No right to counsel is recognized in removal proceedings, and nationally, a mere fourteen percent of immigration detainees are represented by counsel. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 32 (2015). The vast majority of detained immigrants are pro se.

"With only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in complexity.'" *Castro-O'Ryan v. U.S. Dep't of Immigration & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987) (quoting ELIZABETH HULL, WITHOUT JUSTICE FOR ALL 107 (1985)). "A lawyer is often the only person who could thread the labyrinth." *Id.* A pro se litigant therefore faces nearly insurmountable barriers when seeking a remedy for prolonged detention in federal courts.

Pro se habeas petitioners face government attorneys who take full advantage of complex procedural requirements to seek dismissal of their cases – before they are even heard on their merits. *See, e.g., Kholyavskiy v. Achim*, 443 F.3d 946, 949 (7th Cir. 2006) (affirming dismissal of a habeas petition for failure to

allege proper custodian); *Carmona v. Aitken*, No. 14-cv-05321-JSC, 2015 WL 1737839, at *8 (N.D. Cal. Apr. 10, 2015) (dismissing petition for failure to exhaust administrative remedies); *Zhen Yi Guo v. Napolitano*, No. 09 Civ. 3023 (PGG), 2009 WL 2840400, at *5 (S.D.N.Y. Sept. 2, 2009) (applying "immediate custodian" rule to find lack of jurisdiction).

Further, circuits that require a habeas petition to challenge prolonged detention use changing lists of factors whose satisfaction, let alone relevance, is not intuitive to the pro se petitioner. The Third Circuit, for example, inquires whether a petitioner's challenge to removal is in "good faith," essentially demanding a mini-trial on the merits of a removal case in order to win the right to a bond hearing in a custody case. *See, e.g., Chavez-Alvarez v. Warden York Cty. Prison*, 783 F.3d 469, 476 (3d Cir. 2015) (describing "reliance on a contested legal theory" amongst other "real issues" as "[t]he most important consideration for us").

The over two-and-a-half-years of mandatory detention of **Horatio Gomez**,[27] a U.S. citizen, illustrate how pro se litigants are effectively cut off from meaningful relief from prolonged detention if forced to file habeas petitions:

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[27] "Horatio Gomez" is a pseudonym to protect Mr. Gomez's privacy. The facts of Mr. Gomez's case are detailed in a declaration by his attorney. *See* Decl. of Holly Cooper, Esq. of the University of California Davis School of Law Immigration Law Clinic (on file with counsel).

Mr. Gomez immigrated to the United States from Mexico as a lawful permanent resident when he was twelve years old. Mr. Gomez's mother was a United States citizen born in Arizona. When he was detained and placed in removal proceedings based on a misdemeanor marijuana possession conviction and a federal conviction for aiding and abetting in the distribution of marijuana, Mr. Gomez steadfastly argued that he was a U.S. citizen based on his mother's status.

When immigration officials denied his request for a bond hearing, he filed a pro se habeas petition in U.S. district court. The district court rejected the petition on four separate occasions because he failed to comply with procedural rules he did not know existed, including giving a complete history of his immigration case. More than a year passed before the district court finally ordered the government to respond.

One month before that order, the Ninth Circuit decided *Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942 (9th Cir. 2008), holding that detainees whose removal orders had been judicially stayed, like Mr. Gomez, were entitled to bond hearings when their detention became prolonged. Mr. Gomez promptly moved for a *Casas* hearing before the immigration judge and was released on bond. His habeas petition was dismissed as moot. In total, Mr. Gomez spent over a year in mandatory detention *after* filing his pro se petition, and two-and-a-half years altogether.

B. Ad hoc litigation often results in arbitrary denials and delays in due process.

Even those individuals who win a habeas claim face substantial delay in securing relief from prolonged mandatory detention. Given the "surge in immigration appeals and a corresponding surge in the sizes of . . . immigration dockets[,]" *Lora*, 804 F.3d at 615-16, district court review of immigration habeas petitions is frequently unreasonably prolonged itself.

Data on filing and decision dates from cases reported in Westlaw shows that delayed adjudication of habeas petitions alleging unreasonably prolonged detention under § 1226(c) is not an isolated problem confined to one judge or circuit. In the Third Circuit, subsequent to the deciding of *Diop v. ICE/Homeland Security*, 656 F.3d 221, 223 (3d Cir. 2011), which set a "reasonable" time limit on § 1226(c) detention, decisions ordering a § 1226(c) bond hearing have taken a mean of 168 days to issue, or over five-and-a-half months. In the Eleventh Circuit, subsequent to this Court's decision in *Demore v. Kim*, 538 U.S. 510 (2003), the mean decision time for a prolonged detention habeas ordering a § 1226(c) bond hearing is 578 days, nearly 19 months. In the First Circuit, that same figure is 237 days, over seven-and-a-half months. In the Sixth Circuit, the figure is 409 days, almost 14 months.[28]

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[28] The methodology and data underlying these findings is detailed in Decl. of Anthony Enriquez, Esq., of the Immigrant Defense Project (on file with counsel).

It is unjust to require detainees to endure additional months or years of detention in order to vindicate claims that their detention is already unconstitutionally prolonged. **Patrick Thaxter,**[29] a longtime lawful permanent resident, experienced that very injustice:

> Mr. Thaxter has lived in the United States since 1999 and has been a lawful permanent resident for fourteen years. The loving father to five U.S. citizen children, Mr. Thaxter worked for years as a chef at a Caribbean restaurant in Philadelphia to support his family.
>
> In 2013, Mr. Thaxter was convicted of a marijuana offense for which he received no jail time. He was subsequently detained without bond and consequently lost his job as a cook. His family was forced to move from Pennsylvania to a relative's house in Georgia after threats of eviction.
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> After Mr. Thaxter's detention became prolonged, he filed a habeas petition seeking a bond hearing. The district court eventually granted the habeas petition – but a full 530 days after filing. It took six months alone for the district court to refer the case initially to the magistrate judge; an additional eleven months for the magistrate to issue his report and recommendation; and finally two months for the district court to adopt the magistrate's

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[29] The details of Mr. Thaxter's case are specified in *Thaxter v. Sabol*, No. 1:14-CV-02413, 2016 WL 3077351 (M.D. Pa. June 1, 2016). *See also* Decl. of Daniel Conklin, Esq. (on file with counsel).

findings. Notably, the magistrate recognized that Mr. Thaxter's detention had become prolonged by the date of initial filing.

The district court held a bond hearing, found that Mr. Thaxter was neither a flight risk nor danger to the community, and ordered him released. Mr. Thaxter continues to litigate his removal proceedings. Besides traveling to his job, Mr. Thaxter rarely leaves the house because his years in immigration detention accustomed him to confinement.

IV. The Second And Ninth Circuits' Interpretation Avoids The Serious Constitutional Concerns Caused By Prolonged Detention Without A Bond Hearing.

A. *Rodriguez* and *Lora* hearings ensure that individuals are not needlessly detained for prolonged periods.

The stories above illustrate the harms of prolonged detention and the inadequacy of alternatives short of bond hearings. Just as powerful, though, are the stories of those who have received their day in court in the Ninth and Second Circuits. These early recipients of *Rodriguez* and *Lora* bond hearings demonstrate the value of bond hearings in ensuring due process and preventing unjustified detention.

Consider the story of **Mark Hwang**,[30] a lawful permanent resident who was detained and separated from his twin daughters just after their birth:

> Mr. Hwang has been a lawful permanent resident of the U.S. for nearly thirty years, having immigrated to the U.S. from South Korea at the age of nine. In 2013, upon returning home from the hospital with his prematurely born newborn twin daughters, Mr. Hwang was arrested by immigration officials in a home raid. He now faced both deportation and mandatory detention for a marijuana conviction he received fifteen years prior. Shackled and transported to Adelanto Detention Facility, Mr. Hwang was forced to leave his U.S. citizen wife Sarah alone to care for their newborns and two-year-old son and to run their small business.
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> Detention was devastating for Mr. Hwang. He was unable to see his family for long periods. Even when they visited, he was not permitted to hold his children. He tried to have his marijuana conviction vacated, but was unable to appear at any criminal court hearings due to his detention.
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> Finally, after six months of detention, in July 2013 Mr. Hwang was given a *Rodriguez* hearing and ordered released on a $9,000 bond. Mr. Hwang later had his marijuana

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[30] The facts of Mr. Hwang's case are detailed in a declaration by his attorney. *See* Decl. of Stacy Tolchin, Esq. (on file with counsel).

> conviction vacated, and his removal proceedings were subsequently terminated in August 2014, restoring his lawful permanent resident status.

Rodriguez hearings have similarly made all the difference to numerous asylum seekers like **Gloria Cervantes Flores**:[31]

> Growing up in Honduras, Ms. Cervantes faced serious abuse and neglect. Beaten, burned, and forced to work at the age of six years old, Ms. Cervantes experienced unspeakable trauma. As an adult, Ms. Cervantes fell in love only to experience abuse at the hands of her domestic partner. He beat and raped her, punched her in the stomach while she was pregnant, and tried to yank her baby out when she refused to get an abortion. Ms. Cervantes fled the abuse and presented herself at a U.S. port of entry. She was sent to the Mesa Verde Detention Facility in Bakersfield, California, where she passed her credible fear interview. But she was not released.
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> As the months passed, Ms. Cervantes submitted five requests for humanitarian parole, supported by a sponsor letter, financial records, identity documents, and medical documents relating to medical care she needed in detention. Each of the requests was denied,

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[31] The facts of Ms. Cervantes's case are detailed in a declaration by her attorney. *See* Decl. of Luis Angel Reyes Savalza, Esq. of Pangea Legal Services (on file with counsel).

> using boilerplate language. In December 2015, after six months of detention and with her asylum case still pending, Ms. Cervantes finally received a *Rodriguez* bond hearing, and the Immigration Judge granted release on $1,500 bond. With the help of family and friends, Ms. Cervantes's bond was posted and she was able to rejoin her family in Bakersfield, California, where she continues to reside, awaiting her upcoming immigration court hearings.

On the other side of the country, after the Second Circuit interpreted § 1226(c) to avoid constitutional concerns in *Lora v. Shanahan*, individuals like **Aba Dele**[32] also were able to secure due process:

> Mrs. Dele was born in West Africa and experienced a difficult childhood. She was twice raped and struggled to find work to support herself financially.
>
> Afraid of the violence and instability of her life in West Africa, Mrs. Dele came to the United States on a visitor's visa. In 2006, her family began to struggle financially. Facing eviction, Mrs. Dele took some money from the company that employed her to pay her rent. Soon arrested, she was sentenced to probation and restitution, which she paid back in full. Ashamed by what she had done, she rebuilt

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[32] "Aba Dele" is a pseudonym to protect Ms. Dele's privacy. The facts of Ms. Dele's case are detailed in a declaration by her attorney. *See* Decl. of Alina Das, Esq. of the Immigrant Rights Clinic of Washington Square Legal Services (on file with counsel).

her life and eventually become a home health aide for elderly individuals. She married a U.S. citizen and together they raised four children in addition to supporting other family members.

Eight years after her conviction, without any other incidents with the law, Mrs. Dele was dropping her youngest child off at his preschool when she was arrested and shackled by armed immigration agents. Mrs. Dele was detained in a county jail far from the city where she lived. Despite her eligibility for lawful permanent residence as the wife of a U.S. citizen and her role as a caretaker and breadwinner for four young children, she was subjected to mandatory detention based on her prior conviction.

Because her case was within the Second Circuit, Mrs. Dele was eligible for a *Lora* bond hearing. Throughout the long months of separation from her children, she focused desperately on the date of her bond hearing, and in October 2016 was granted a $3,000 bond. Her husband posted the bond and she was released back to her family. She continues to pursue her adjustment of status application.

Similarly, the story of **Alexander Lora**[33] -- the man whose case gave rise to prolonged detention bond

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[33] Details of Mr. Lora's story are described in *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015). *See also* Decl. of Talia Peleg, Esq. of Brooklyn Defender Services (on file with counsel).

hearings in the Second Circuit – illustrates the power of bond hearings to ensure due process:

> Alexander Lora is a lawful permanent resident from the Dominican Republic who has lived in the United States since he was seven years old. In 2014, Mr. Lora was placed into removal proceedings and detained based on a 2010 drug offense, for which he had been sentenced to probation with no jail time. His immigration detention without bond forcibly separated Mr. Lora for the first time from his family in Brooklyn. Left behind were his fiancée, his ailing mother for whom he provided care, and his then-two-year-old son, who was placed into foster care while Mr. Lora was detained.
>
> Although he was able to establish eligibility for relief from removal, his case continued for months and Mr. Lora remained detained. The grant of his habeas petition, which ultimately resulted in the Second Circuit's decision in *Lora v. Shanahan*, led to a bond hearing. At the bond hearing, the government stipulated to a bond of $5,000 and waived appeal. Since his release, Mr. Lora reunited with his family in Brooklyn, got his U.S. citizen son out of foster care, obtained gainful employment as a unionized construction worker, and married his U.S. citizen fiancée. He continues to work and provide for his family as he awaits his upcoming hearing on cancellation of removal.

Individuals like Mr. Hwang, Ms. Cervantes, Mrs. Dele, and Mr. Lora are not alone. In the Ninth Circuit,

over the course of an eighteen-month period, approximately 1680 bond hearings were held for *Rodriguez* class members.[34] Sixty-nine percent of individuals in these hearings were granted bond.[35] In the Second Circuit, in the approximately nine-month period after the court issued *Lora*, at least 158 *Lora* hearings were held for indigent noncitizens in one immigration court within the Second Circuit alone.[36] Sixty-two percent of individuals who received these *Lora* hearings were granted bond.[37]

Notably, not everyone who received a *Rodriguez* or a *Lora* bond hearing was released. Based on available data, 31% of *Rodriguez* hearings and 38% of *Lora* hearings resulted in the denial of bond.[38] The Government repeatedly conflates the provision of a bond hearing with a grant of release. The data reveals no such equivalence.

B. The procedural protections in *Rodriguez* and *Lora* hearings ensure that noncitizens are not arbitrarily deprived of their liberty.

The procedural protections in *Rodriguez* and *Lora* hearings are essential to the provision of due process.

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[34] J.A. 526.

[35] J.A. 528.

[36] Vera Institute of Justice, *supra* n. 15, at 1.

[37] *Id.*

[38] *Id.*; J.A. 528.

In these hearings, the government must justify continued detention by clear and convincing evidence. *See Rodriguez v. Robbins*, 804 F.3d 1060, 1077 (9th Cir. 2015); *Lora v. Shanahan*, 804 F.3d 601, 616 (2d Cir. 2015). Moreover, if an individual remains detained, hearings must reoccur every six months, and the length of the continuing detention must be considered at these hearings. *Rodriguez*, 804 F.3d at 1088-90.

As the story of **Sylvester Owino**[39] illustrates, these procedural protections are critical to ensuring that bond hearings are constitutionally adequate and meaningful:

> A member of a minority tribe in Kenya during a period of political unrest, Mr. Owino was arrested and tortured by Kenyan police on multiple occasions. Mr. Owino fled Kenya in 1998, securing a student visa to study in the United States, and made this country his home.
>
> Years later, battling struggles with alcohol, Mr. Owino was convicted of robbery and placed in removal proceedings. Detained by immigration officials in 2006, Mr. Owino applied for protection from removal to Kenya under the Convention Against Torture.
>
> Thus began Mr. Owino's nine-year ordeal in mandatory detention. His applications both for bond and relief from removal were initially denied and it ultimately took multiple Ninth

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[39] The details of Mr. Owino's case are described in *Owino v. Holder*, 771 F.3d 527 (9th Cir. 2014). *See also* Decl. of James Fife, Esq. (on file with counsel).

Circuit decisions to correct the various errors committed by the Immigration Judge and the B.I.A.

As the years passed, Mr. Owino repeatedly sought new bond hearings, but his requests for release were denied. After the Ninth Circuit issued its decision in *Rodriguez*, Mr. Owino was transferred to a detention facility in Alabama. Community Initiatives for Visiting Immigrants in Confinement mounted a successful campaign to return him to the Ninth Circuit. Only then was Mr. Owino given another bond hearing. The Immigration Judge ultimately granted Mr. Owino release on $1,500 bond, which community members raised in less than thirty minutes. After nine years, Mr. Owino was able to regain his freedom.

People who are detained for years without a final order of removal, like Mr. Owino, are by definition succeeding in their lawful efforts to defend themselves against deportation. Periodic bond hearings, where the length of detention is considered, allow immigration judges to account for these struggles and the punitive aspects of such prolonged detention.

CONCLUSION

The stories of the community members and clients described in this brief demonstrate the harsh consequences that prolonged detention has on individuals

who lack meaningful access to constitutionally adequate bond hearings. *Amici* respectfully urge this Court to consider the unjust impact that this interpretation has on the immigrant communities we represent and uphold the decision of the Ninth Circuit in this case.

Respectfully submitted,

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APPENDIX

DESCRIPTION OF AMICI CURIAE

Americans for Immigrant Justice

Americans for Immigrant Justice ("AI Justice"), formerly Florida Immigrant Advocacy Center, is a nonprofit law firm dedicated to promoting and protecting the basic rights of immigrants. AI Justice is dedicated to advancing and defending the rights of immigrants in detention.

Black Alliance for Just Immigration

The Black Alliance for Just Immigration ("BAJI") is a national organization that organizes, advocates, and raises awareness around issues facing Black immigrants, including immigrants from Africa, the Caribbean, and elsewhere, in the United States. For over a decade BAJI has engaged Black communities to advance the interests of immigrants facing detention and deportation.

Boston College Law School Immigration Clinic

The Boston College Law School Immigration Clinic ("BC Immigration Clinic") is a clinical program of Boston College Law School. The BC Immigration Clinic regularly represents clients who are detained by the Immigration and Customs Enforcement ("ICE"); in these cases, students represent clients both in their removal proceedings and bond hearings. As such, the BC Immigration Clinic has an interest in ensuring

that more detainees are entitled to a bond hearing and that the procedures used in such bond hearings are fair and adequately protect detainees' liberty interests.

Boston University's Immigrants' Rights Clinic

Boston University's Immigrants' Rights Clinic ("IRC") is a law school clinic that provides direct representation to immigrants in removal proceedings, including individuals who face detention without bond pending removal proceedings. IRC has held legal orientation projects within immigrant detention centers and has a longstanding interest in promoting the rights of immigrants in detention.

Brandeis Human Rights Advocacy Program of the University of Louisville School of Law

The Brandeis Human Rights Advocacy Program of the University of Louisville School of Law works actively with the local community, non-profits and stakeholders in the community to advance the human rights of immigrants, refugees and noncitizens.

Bronx Defenders

Founded in 1997, the Bronx Defenders provides innovative, holistic, and client-centered criminal defense, removal defense, family defense, social work support and other civil legal services and advocacy to indigent Bronx residents. Under the New York Immigrant Family Unity Project, we represent over 330 detained

non-citizens every year and witness the adverse impact of prolonged detention on our clients, their ability to pursue legal claims to stay in this country, and their families.

Brooklyn Defender Services

Brooklyn Defender Services ("BDS") is a public defender organization that represents more than 45,000 people every year who cannot afford an attorney in criminal, family, and immigration proceedings. Since 2013, BDS has provided removal defense services through the New York Immigrant Family Unity Project, New York's first-in-the-nation appointed counsel program for detained New Yorkers facing removal who cannot afford an attorney. BDS represents Alexander Lora, the petitioner in *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015) in his removal proceedings, and represented him before the federal district court and circuit court.

Center for Community Change

The Center for Community Change ("CCC") is a national not-for-profit organization that works to empower low-income people, particularly in communities of color, to make change that improves our communities and public policy. CCC has a longstanding history of advancing and defending the rights of immigrants. CCC coordinates the Fair Immigration Reform Movement (FIRM), a network of 42 member organizations in 33 states, working to keep families together and fix

our nation's broken immigration system. As part of this work, we have encountered countless numbers of immigrant community members who have had their lives ripped apart because of prolonged detention. We have witnessed firsthand the devastating impact detention has on immigrant families.

Center for Constitutional Rights

The Center for Constitutional Rights ("CCR") is a national non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international human rights law. Founded in 1966, CCR has a long history of litigating cases on behalf of those with the fewest protections and least access to legal resources, including numerous landmark civil and human rights cases fighting for racial and immigrant justice and protection from indefinite detention and solitary confinement.

Center for Gender & Refugee Studies

The Center for Gender & Refugee Studies ("CGRS") at the University of California Hastings College of the Law works to protect the fundamental human rights of asylum seekers, with a particular focus on expanding protection for women, children, and LGBT individuals. CGRS has played a central role in the development of law and policy related to asylum seekers, including on detention and enforcement issues.

Coalition for Humane Immigrant Rights of Los Angeles

The Coalition for Humane Immigrant Rights of Los Angeles ("CHIRLA") is a non-profit organization with local and state presence in California, and national recognition. Our mission is to advance the human, civil rights, and full integration of New Americans and their children into the fabric of our society.

Community Initiatives for Visiting Immigrants in Confinement

Community Initiatives for Visiting Immigrants in Confinement ("CIVIC") is the national immigration detention visitation network, which is working to end U.S. immigration detention by monitoring human rights abuses, elevating stories, building community-based alternatives to detention, and advocating for system change. CIVIC has a longstanding interest in this Court's decision and has been advocating for years against the lengthy detention of noncitizens held in pre-removal immigration detention in the United States. *See, e.g.*, Rethinking Pre-removal Immigration Detention in the United States: Lessons from Europe and Proposals for Reform, *Oxford University Press – Refugee Survey Quarterly* (2012) 31 (3):69-100, doi:10.1093/rsq/hds007, *available at* http://tinyurl.com/hds007.

Community Justice Clinic of the University at Buffalo School of Law

Community Justice Clinic of the University at Buffalo School of Law ("CJC") is a law school clinic that represents immigrants, including individuals who are subject to the mandatory detention provisions of the Immigration and Nationality Act. CJC also represents and works with immigrant-led organizations with members who have been subject to prolonged detention.

Community Legal Services in East Palo Alto

Community Legal Services in East Palo Alto ("CLSEPA") is a non-profit organization that provides legal assistance to low-income immigrants in and around East Palo Alto, California, where two-thirds of the population is Latino or Pacific Islander. The immigration team provides consultations to and represents local residents in various types of immigration benefits and proceedings, including detained and non-detained removal proceedings in immigration court.

Criminal/Immigration Defense Clinic at Colorado Law School

The Criminal/Immigration Defense Clinic at Colorado Law School is a law clinic that represents indigent clients charged with misdemeanor offenses in Boulder County, CO. We have witnessed first-hand the devastating impacts of prolonged detention on immigrants

while they pursue their ability to remain in the U.S. with their families.

Cumberland Legal Aid Clinic

The Cumberland Legal Aid Clinic, through its Refugee and Human Rights clinical program, is a law-school based clinic in which law students represent immigrants fleeing human rights abuses who wish to remain in the U.S. The clinic regularly represents immigrants who face detention and are seeking asylum, withholding of removal, protection under the Convention Against Torture, special immigrant juvenile status, protection under the Violence Against Women Act or adjustment of status. We are intimately familiar with the adverse impact prolonged detention has on an immigrant's ability to defend against removal.

Detention Watch Network

As a national coalition of organizations and individuals concerned about the impact of immigration detention on individuals and communities in the United States, Detention Watch Network ("DWN") has a substantial interest in the outcome of this litigation. Founded in 1997, DWN has worked for nearly two decades to fight abuses in detention, and to push for a drastic reduction in the reliance on detention as a tool for immigration enforcement. Since 2011, through its advocacy and organizing work, DWN has been advocating for the elimination of all laws mandating the detention of immigrants.

Dolores Street Community Services

Dolores Street Community Services ("DSCS") provides pro bono removal defense to low-income immigrants in San Francisco, CA, specializing in representing particularly vulnerable clients. DSCS clients have suffered the severe consequences of prolonged detention; some clients have accepted removal orders despite fears of persecution and other compelling claims for relief, simply because they could no longer endure detention. Other clients have experienced the incalculable benefits of an individualized custody determination, often released on their own recognizance or minimal bond after six months of unreviewed custody.

El Centro del Inmigrante

El Centro del Inmigrante is a not-for-profit organization. We have been advocating for immigrant rights for the last 10 years. We focus mainly in providing services to low income immigrant families supporting them with applications for Citizenship, DACA and other immigration benefits. Part of our efforts is to find permanent remedies for our broken immigration system. We believe that prolonged detentions without bond are serious violations of basic human rights.

Florida Coastal Immigrant and Human Rights Clinic

The Immigrant and Human Rights Clinic engages in both direct legal services to non-citizens as well as legal advocacy projects. Students represent clients in

removal proceedings in both the detained and non-detained setting and conduct know your rights presentations for detainees.

Florida Institutional Legal Services Project of Florida Legal Services

The Florida Institutional Legal Services Project of Florida Legal Services ("FILS Project") is dedicated to protecting and advancing the rights of indigent people in state and federal custody in Florida by providing high quality legal services. For years, we have engaged in monitoring, advocacy, and litigation regarding conditions of detention for immigrant detainees in Florida, including in very remote contracted county jails and at Krome, the large immigrant detention facility in Miami, Florida.

Georgia Detention Watch

Georgia Detention Watch is a coalition of organizations and individuals that advocates alongside immigrants to end the inhumane and unjust detention and law enforcement policies and practices directed against immigrant communities in our state. Our coalition includes activists, community organizers, persons of faith, lawyers, and many more.

Georgia Latino Alliance of Human Rights

The Georgia Latino Alliance for Human Rights ("GLAHR") is a statewide nonprofit organization

whose mission is to build the capacity and power of immigrant communities. For more than a decade, GLAHR has dedicated its efforts to community organizing to defend and advance the civil and human rights of immigrants regardless of their immigration status.

Grassroots Leadership

Grassroots Leadership is an Austin, Texas-based national organization that works to end prison profiteering and reduce reliance on criminalization and detention. Grassroots Leadership has long advocated for community-based alternatives to detention, particularly for vulnerable populations including asylum-seeking women and families. We have also witnessed the impact of prolonged detention on migrants and their families after they have been released from detention and as they attempt to integrate into the community.

Immigrant Defense Project

Immigrant Defense Project ("IDP") is a not-for-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants accused and convicted of crimes. IDP provides defense attorneys, immigration attorneys, immigrants, and judges with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law.

Immigrant Justice Corps

Immigrant Justice Corps ("IJC") is the country's first immigration legal fellowship program. IJC seeks to expand access to counsel by increasing the quantity of immigration lawyers and the quality of the immigration bar. IJC's fellows regularly represent detained noncitizens and have seen the impact of long-term detention on their clients' well-being and their ability to pursue relief.

Immigrant Rights Clinic of Washington Square Legal Services, Inc.

Immigrant Rights Clinic of Washington Square Legal Services, Inc. ("IRC") is a law clinic that represents and works with immigrants and immigrant rights organizations, including individuals who face detention without bond pending removal proceedings. IRC has a longstanding interest in advancing and defending the rights of immigrants in detention.

Immigrants' Rights Clinic of Morningside Heights Legal Services, Inc.

Immigrants' Rights Clinic of Morningside Heights Legal Services, Inc. ("IRC") is a law clinic that represents immigrants, including individuals in detention. IRC is committed to advocating on behalf of and advancing the rights of immigrants in detention.

Immigration Clinic of the University of Miami School of Law

Immigration Clinic of the University of Miami School of Law is a law clinic that advocates on behalf of immigrants in a wide variety of administrative and federal court immigration proceedings and collaborates with immigrant rights groups on projects to advance the cause of social justice for immigrants. Many of the clinic's clients are detained. The clinic has challenged the lawfulness of the prolonged detention of its clients in U.S. District Court and appeared as counsel for *amici curiae* in *Sopo v. U.S. Atty Gen.*, 825 F.3d 1199 (2016).

Irish International Immigrant Center

The Irish International Immigrant Center ("IIIC") is a multi-service welcome center for immigrants of all nationalities, based in Boston, Massachusetts. Originally founded in 1989 to serve the needs of Irish immigrants in the New England area, the IIIC now annually provides immigration, education, and social services to thousands of immigrants from around the world.

Kathryn O. Greenberg Immigration Justice Clinic at the Benjamin N. Cardozo School of Law

The Kathryn O. Greenberg Immigration Justice Clinic at the Benjamin N. Cardozo School of Law ("IJC") is a law clinic that represents individuals facing deportation, as well as community-based organizations, in

both public policy and litigation efforts. IJC has a long-established interest in fighting for the rights of immigrants pursuing their ability to remain in the U.S., including representing people who face detention without bond pending removal proceedings.

LatinoJustice PRLDEF

LatinoJustice PRLDEF is a national not-for-profit civil rights legal defense fund which has defended the constitutional rights, civil rights and the equal protection of all Latinos under law. Since 1972, PRLDEF's mission has been to promote civic participation, to cultivate Latino leaders, and to promote voting rights, employment opportunity, language rights, educational access, and immigrants' rights.

Lawyers' Committee for Civil Rights of the San Francisco Bay Area

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area (LCCR) is a non-profit legal services and social justice organization that works in partnership with the private bar to protect and advance the rights and status of people of color, low-income communities, and immigrants and refugees through direct legal services, impact litigation, and policy advocacy. As part of LCCR's core commitment to protecting the rights of asylum seekers, it has a strong interest in preventing the harmful effects of prolonged detention on noncitizens and their ability to fairly defend themselves in removal proceedings.

Legal Aid Society of New York

The Legal Aid Society of New York was founded in 1876 to serve New York's immigrant community and is the nation's oldest and largest not-for-profit law firm for low-income persons. For several decades, Legal Aid has maintained an Immigration Law Unit ("ILU") within its Civil Practice. The ILU has an expertise in representing immigrants at the intersection of criminal and immigration law and has also represented, and served as amicus on behalf of, immigrants seeking release from prolonged and mandatory detention in habeas and other federal court proceedings.

Loyola University New Orleans College of Law Clinic

The Loyola University New Orleans College of Law Clinic has operated an Immigration Clinic for decades. Louisiana is home to three major immigration detention centers and has a growing population of immigrants. Our Immigration Clinic has been providing assistance to people in the Deep South outside of Louisiana as well.

Make the Road New York

Make the Road New York ("MRNY") is a nonprofit, membership-based community organization that integrates adult and youth education, legal and survival services, and community and civic engagement, in a holistic approach to help low-income New Yorkers improve their lives and neighborhoods. MRNY is at the

forefront of numerous initiatives to analyze, develop, and improve civil and human rights for immigrant communities, including issues related to detention and deportation of immigrant communities.

National Day Laborer Organizing Network

The National Day Laborer Organizing Network ("NDLON") is a national non-profit organization that works to improve the lives of day laborers and immigrant communities. NDLON advocates for the rights of people facing immigration detention, including those who have experienced prolonged detention.

National Immigration Law Center

The National Immigration Law Center ("NILC") is the primary national organization in the United States exclusively dedicated to defending and advancing the rights and opportunities of low-income immigrants and their families. Over the past 35 years, NILC has won landmark legal decisions, including *Orantes-Hernandez v. Smith*, that have sought to protect fundamental due process rights for all individuals, regardless of immigration status.

National Latina Institute for Reproductive Health

The National Latina Institute for Reproductive Health ("NLIRH") is a not-for-profit organization dedicated to advancing the health, dignity, and justice for the 28

million Latinas, their families, and their communities in the United States. NLIRH has a longstanding history of working to ensure fair treatment of women, children, and families, irrespective of legal status. As part of its work, it recognizes the direct impact immigration status has on access to reproductive health care. The deprivation of rights, family disruption, inadequate access to health care, loss of livelihood, retraumatization and abuse that are inherent to conditions of confinement, are only exacerbated through prolonged detention.

Neighborhood Defender Services of Harlem

Neighborhood Defender Services of Harlem ("NDS") is a public defense organization that represents non-citizens who are arrested in New York City. Specifically, the Immigration Practice represents non-citizens in removal proceedings, including individuals who are held in immigration detention without bond.

New York Immigration Coalition

The New York Immigration Coalition ("NYIC") is an advocacy and policy umbrella organization for more than 175 multi-ethnic, multi-racial, and multi-sector groups across the state. Through its members and its own advocacy the NYIC has long worked against unjust immigration policies, including the use of detention against immigrants.

Pangea Legal Services

Pangea Legal Services ("Pangea") is a nonprofit organization that advocates for immigrants in deportation proceedings through legal representation, community empowerment, and policy advocacy. The impact of prolonged detention for Pangea's clients is stark: it has resulted in a loss of employment, loss of custody by mothers over their minor children, traumatized children who experience loss of a parent, loss of health, reliving traumas of being held captive in detention after escaping abusive captivity abroad, eviction from the home, and homelessness by immediate relatives of detained immigrants.

Project South

Project South is a Southern-based leadership development organization that creates spaces for movement building. We work with communities pushed forward by the struggle – to strengthen leadership and to provide popular political and economic education for personal and social transformation. We build relationships with organizations and networks across the U.S. and global South to inform our local work and to engage in bottom-up movement building for social and economic justice. Our legal and advocacy work is focused on defending Muslim and immigrant communities against discrimination.

Public Counsel

Public Counsel is the nation's largest pro bono law firm based in Los Angeles, California. Founded in 1970, Public Counsel's primary goals are to: (1) protect the legal rights of disadvantaged children; (2) represent immigrant victims of torture, persecution, domestic violence, trafficking, and other crimes; and (3) foster economic justice by providing underserved communities with access to quality legal representation. In support of these goals, Public Counsel represents indigent immigrants from around the world in their claims before the United States Citizenship & Immigration Services, the Executive Office for Immigration Review, and the federal courts. These include many detainees who have suffered the adverse impact of prolonged detention.

Queens Law Associates – Public Defenders

Queens Law Associates – Public Defenders ("QLA") is a nonprofit legal service provider representing low-income individuals – some of whom are noncitizens – facing criminal charges in the criminal justice system. QLA also provides free legal services to noncitizens in their immigration matters, including representation in deportation proceedings. QLA has a direct interest in this case, as its clients may be subject to mandatory detention provisions based on convictions and may be detained by ICE for prolonged periods.

Reformed Church of Highland Park

Weekly since 2009, the Reformed Church of Highland Park has visited detainees at the Elizabeth Detention Center. We assist asylum seekers, victims of trafficking, people with final orders of deportation, and migrants without status. We support children in our congregation whose parents have been deported. We have cared for unaccompanied minors, DACA-eligible and DAPA-hopeful individuals, and immigrant victims of domestic violence. We work to reunite families. We resettle refugees through Interfaith RISE (Refugee & Immigrant Services & Empowerment), a program of our congregation's nonprofit community development agency, Churches Improving Communities.

Seton Hall University School of Law Center for Social Justice

The Seton Hall University School of Law Center for Social Justice ("CSJ") empowers law students to gain critical, hands-on experience while providing pro bono legal services for low-income residents in the region. The Center has long worked to defend the statutory, constitutional, and human rights of immigrants.

Southeast Asia Resource Action Center

The Southeast Asia Resource Action Center ("SEARAC") is a national organization that advances the interests of Cambodian, Laotian, and Vietnamese American communities who came to this country as the largest group of refugees ever resettled in the U.S.

Due to outdated immigration laws passed in 1996 mandating the automatic detention and removal of immigrants with old criminal convictions without due process, almost 16,000 community members have received final orders of deportation since 1998. Many of these individuals have been subjected to mandatory and prolonged detention, due to complex repatriation agreements between the U.S. and Southeast Asian governments. SEARAC has been an outspoken advocate in the movement to strengthen protections for all immigrants and refugees who suffer prolonged detention as a result of our broken immigration system.

Southern Poverty Law Center

The Southern Poverty Law Center ("SPLC") fights all forms of discrimination and works to protect society's most vulnerable members through litigation, education, and monitoring organizations that promote hate. The SPLC provides pro bono assistance to and advocates on behalf of immigrant detainees throughout the southern United States, including Alabama, Florida, Georgia, Louisiana, and Mississippi.

University of California Davis School of Law Immigration Law Clinic

The University of California, Davis School of Law Immigration Law Clinic ("The Clinic") is an academic institution dedicated to defending the rights of detained noncitizens in the United States. The Clinic

provides direct representation to detained immigrants who are placed in removal proceedings.

University of California, Irvine School of Law Immigrant Rights Clinic

The University of California, Irvine School of Law Immigrant Rights Clinic is a law clinic providing pro bono legal services to immigrants in removal proceedings. The Clinic also partners with community and legal advocacy organizations on policy and litigation projects to advance immigrants' rights and immigrant workers' rights. For several years, clinic students working under the supervision of faculty attorneys have represented immigrants detained at the Adelanto Detention Center and Orange County, CA facilities in their bond hearings.

University of Houston Law Center Immigration Clinic

The University of Houston Law Center Immigration Clinic advocates on behalf of immigrants in a broad range of complex legal proceedings before the immigration and federal courts and the Department of Homeland Security. The Clinic collaborates with other immigrant and human rights groups on projects that advance the cause of social justice for immigrants.

University of Maryland Carey School of Law Immigration Clinic

The University of Maryland Carey School of Law Immigration Clinic represents individuals in immigration removal proceedings, including individuals who are detained without bond. The Clinic represents individuals who are subject to mandatory detention, many of whom end up being detained for prolonged periods of time.

University of Tulsa College of Law Immigrant Rights Project

The Immigrant Rights Project is a clinical program of the University of Tulsa College of Law. The program aims to help address a significant need for legal representation and advocacy on behalf of vulnerable immigrants in our community. Clinic students and faculty have participated in a range of advocacy projects involving asylum seekers and other immigrant detainees in detention centers in Oklahoma and elsewhere.

UnLocal, Inc.

UnLocal, Inc. ("UnLocal") is an immigration legal services and community education non-profit based in New York City. UnLocal provides presentations on immigration law, know your rights trainings, and legal consultations at community-based spaces including schools, workplaces, places of worship and other immigrant-serving organizations. UnLocal clients and the membership of many of UnLocal's community-based

partners include individuals who have faced detention without bond during the pendency of their removal proceedings.

Valparaiso University Law School Immigration Clinic

The Valparaiso Immigration Clinic ("VIC") is a law clinic at Valparaiso University Law School that represents immigrants in Northwest Indiana and Chicago, including individuals who have been held in immigration detention. VIC students have also assisted with case intake for immigrant detainees, provided community outreach in Northwest Indiana concerning immigrant rights issues, and represented immigrant rights organizations that work with immigrant detainees.

Washington and Lee University School of Law Immigrant Rights Clinic

The Washington and Lee University School of Law Immigrant Rights Clinic provides free legal services to non-citizens in removal proceedings in Virginia. Many of our clients are detained in the immigrant detention facility in Farmville, VA, which is the primary detention facility in Virginia, housing between 600-700 non-citizens.

Washington Defender Association

The Washington Defender Association ("WDA") is a statewide non-profit organization whose membership is comprised of public defender agencies, indigent defenders and those who are committed to seeing improvements in indigent defense. In 1999, WDA established WDA's Immigration Project to give the Washington defense bar access to expert immigration law resources in order to effectively represent their noncitizen clients with regard to the immigration consequences at stake in their criminal cases. Detention issues are a vital part of the immigration consequence of a conviction, and can radically affect access to counsel and case outcomes.

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AND
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No. 15-1204

In The

Supreme Court of the United States

DAVID JENNINGS, et al.,

Petitioners,

v.

ALEJANDRO RODRIGUEZ, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE AMERICANS FOR IMMIGRANT JUSTICE, ET AL. IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

Amici curiae are community groups, immigrant rights organizations, law clinics, and legal service providers whose members and clients face the severe consequences of prolonged detention without bond hearings.[1] We have a profound interest in ensuring that the voices of our members and clients are included in the resolution of the legal issues in this case.

We previously submitted a brief describing the harsh and perverse effects of prolonged detention on our members and clients, their families and communities, and the immigration system that Congress designed to maintain family unity and offer humanitarian relief. Brief of Americans for Immigrant Justice, et al., *Jennings v. Rodriguez*, No. 15-1204 (filed Oct. 24, 2016) (hereinafter "AIJ Br.").[2] The Court then requested additional briefing on the constitutionality of detention beyond six months without a bond hearing. We now submit this additional brief to illustrate the profound liberty interests at stake when individuals with strong incentives to appear in court are detained for months and years in prison-like conditions.

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[1] Amici state that no counsel for a party authored any part of this brief, and no person or entity other than amici and their counsel made a monetary contribution to the preparation or submission of this brief. Both petitioners and respondents have consented to the filing of this brief pursuant to Rule 37.3(a).

[2] An annotated version of our previously filed brief is available at https://www.prolongeddetentionstories.org.

SUMMARY OF ARGUMENT

"The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty. . . ." *Boumediene v. Bush*, 553 U.S. 723, 739 (2008). That liberty "'denotes not merely freedom from bodily restraint but also the right of the individual . . . to engage in any of the common occupations of life, . . . to marry, establish a home and bring up children, . . . and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.'" *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 572 (1972) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

Prolonged detention gravely burdens these liberties. It inflicts not only bodily restraint, but also long-term separation from family and gainful employment; imposes physical, mental, and emotional harms that are materially indistinguishable from punishment; and coerces people into accepting erroneous deportation. Given the substantial liberty interests at stake in this case, a bond hearing is the constitutionally proper protection of due process.

Denied a day in court for a judge to determine if their detention is justified, individuals in prolonged detention who present neither a flight risk nor a danger languish in prisons and jails for months or even years. *See* AIJ Br. at 3-17. Their prolonged detention strips them of basic human dignities in a manner that is, from a practical viewpoint, identical to punitive incarceration. Individuals are locked in cells, separated

from their families, and thrown into solitary confinement for minor infractions. They lose their jobs and homes, and their families pay the price. No other civil or criminal confinement permits such treatment without an individualized hearing at some fixed point in time.[3]

The government does not dispute that the Constitution demands due process protection for the liberty of at least some people trapped in prolonged mandatory immigration detention. But it urges this Court to limit any such protection to the "extraordinary case": detentions of some indeterminate length between three and twenty years. Second Brief of Petitioners at 46, *Jennings v. Rodriguez*, No. 15-1204 (filed Jan. 31, 2017) (hereinafter "Gov't Second Br."); Transcript of Oral Argument at 12-15.[4] Even then, it would place the

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[3] *See* Second Brief of Respondents at 12, *Jennings v. Rodriguez*, No. 15-1204 (filed Jan. 31, 2017) (citing cases).

[4] JUSTICE KAGAN: . . . Could the Court simply say, well, three years is too long? It doesn't really matter what kind of evidence you have; three years is too long.

GENERAL GERSHENGORN: So, Your Honor, I – I think our position in that – in that situation would be that as long as the government was diligently – we – I mean, if it were 20 years, I mean, we could go on, then, of course, that might be a concern that, in fact, we were no longer trying to effectuate removal. I think we would make the argument in the three years Your Honor was hypothesizing, but that's not the situation we have[.] It's been steady –

. . .

JUSTICE BREYER: You said, well, 20 years would be different, and – and –

GENERAL GERSHENGORN: I did it – to be clear, Your Honor, I did it as a matter of constitutional law.

burden of protection on the injured party, requiring a detained individual – more often than not unrepresented and with limited English-language proficiency – to file and litigate a habeas petition in federal court simply to seek an individualized hearing on whether her detention is justified. The government defends its position in part by pointing to the process afforded to immigrants in removal proceedings generally, and arguing that those who are detained hold the keys to their own cells if they would only give up their claims and accept deportation.[5] Gov't Second Br. at 13, 34-35.

The government's position gravely undervalues the serious liberty interests at stake in this case. It

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[5] According to the government, individuals who have final orders of removal – i.e., who have already been detained pending a decision of the Immigration Judge *and* the Board of Immigration Appeals – may then agree to their deportation (thus securing their freedom from immigration detention) and litigate a federal appeal abroad. Gov't Second Br. at 34. This solution provides no remedy for the months and years of detention that may occur prior to a final order of removal, nor does it guarantee that a person who is deported pending a federal appeal will be able to return to the U.S.

In fact, the government, as a matter of policy, will not pay for the return of indigent petitioners who prevail on federal appeals after they are removed; and any assurance of the possibility of return is contingent on the vagaries of the administration's internal, unenforceable policies, a risk that detainees would take at their peril. *See* Tianyin Luo and Sean Lai McMahon, *Victory Denied: After Winning On Appeal, An Inadequate Return Policy Leaves Immigrants Stranded Abroad*, 19 BENDER'S IMM. BULLETIN 1061 (Oct. 1, 2014). In any event, the significant due process harms of prolonged detention occur far before a final order of removal is entered, and the government's solution does not address these harms.

ignores the unique harms caused by prolonged detention, above and beyond those caused by one's placement in removal proceedings. Its position effectively permits the punitive conditions of prolonged detention to coerce people into giving up their meritorious claims.

Below, our clients' stories illustrate the profound losses of liberty that the government leaves unmentioned. Their stories, emblematic of countless others across decades of mandatory detention, have taught us that without bond hearings, people who are not flight risks or dangers will languish and suffer in detention for months or years on end.

ARGUMENT

I. There Is No Meaningful Difference Between Prolonged Immigration Detention and Punitive Incarceration.

An honest evaluation of the liberty at stake in prolonged mandatory detention requires a clear-eyed assessment of the nature of immigration detention. Recent changes to the detention system and the day-to-day reality of detainees challenge the assumption that it is merely non-punitive civil incapacitation. In fact, prolonged mandatory detention is materially indistinguishable from punitive incarceration, and is deserving of robust due process protections. Today's detention centers operate on a penal model, are experienced by immigrants as punishment, and cause grave

deprivations of liberty for immigrants trapped in the detention system for months or years.

A. Immigration detention operates on a penal model.

The use of immigration detention as an enforcement tool has expanded to an unprecedented scope since this Court's decision in *Demore v. Kim* over a decade ago. 538 U.S. 510 (2003). In spite of historic lows in undocumented immigration,[6] since 2011 the government has detained over 400,000 immigrants annually, roughly double the number at the time *Demore* was decided.[7] Immigration court caseloads have similarly skyrocketed for individuals and families alike, causing record delays in the adjudication of their claims and further extending the length of detention.[8] A 2016

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[6] Robert Warren, Ctr. for Migration Stud., *US Undocumented Population Drops Below 11 Million in 2014, with Continued Declines in Mexican Undocumented Population*, 4 J. ON MIGRATION AND HUM. SECURITY 1, 3 (2016), http://dx.doi.org/10.14240/jmhs.v4i1.58.

[7] MIGRATION AND REFUGEE SERVICES/UNITED STATES CONFERENCE OF CATHOLIC BISHOPS AND THE CENTER FOR MIGRATION STUDIES, UNLOCKING HUMAN DIGNITY: A PLAN TO TRANSFORM THE U.S. IMMIGRANT DETENTION SYSTEM 9 (2015), http://www.usccb.org/about/migration-and-refugee-services/upload/unlocking-human-dignity.pdf.

[8] The backlog in immigration courts currently stands at over 533,000 cases, a historical high. Transactional Records Access Clearinghouse, Syracuse Univ., *Immigration Court Backlog Tool*, http://trac.syr.edu/phptools/immigration/court_backlog/. As a result, a case now takes on average 678 days – close to two years – to resolve, and in some jurisdictions the average wait time is

report estimated that in order to bring the average case-processing time to under one year by 2023, an additional 150 immigration judges would need to be hired.[9] Instead, case-processing times are certain to lengthen due to the recent imposition of "a freeze on the hiring of Federal civilian employees to be applied across the board in the executive branch" – preventing the hiring of additional immigration judges.[10]

As detention has expanded, it has become increasingly penal in nature. Our nation's first immigration detention centers were run by the federal government for the purpose of processing and screening newcomers to our shores.[11] But today, the immigration detention system consists of more than 200 prisons and jails operating on a penal model – ninety percent of which are

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edging towards three years. Transactional Records Access Clearinghouse, Syracuse Univ., *Average Time Pending Cases Have Been Waiting in Immigration Courts*, http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog_avgdays.php.

[9] HUMAN RIGHTS FIRST, REDUCING THE IMMIGRATION COURT BACKLOG AND DELAYS (2016), http://www.humanrightsfirst.org/sites/default/files/HRF-Backgrounder-Immigration-Courts.pdf.

[10] Presidential Memorandum Regarding the Hiring Freeze, 82 Fed. Reg. 8493 (Jan. 23, 2017). During the previous immigration court hiring freeze, the case backlog increased by more than 298,000 over four years. *See Oversight of the Executive Office for Immigration Review: Hearing Before the Subcomm. on Immigration and Border Security of the H. Comm. on the Judiciary*, 114th Cong. 5-6 (2015) (statement of Juan P. Osuna, Director, Executive Office for Immigration Review).

[11] DANIEL WILSHER, IMMIGRATION DETENTION: LAW, HISTORY, POLITICS 11-14 (2012).

run by private prison corporations or county correctional departments.[12] In some of these facilities, immigrants are held with individuals awaiting criminal trial or serving criminal sentences, and all are subject to onerous restraints on their liberties.[13] Only months ago, the Department of Homeland Security ("DHS") converted the same private prisons that the Department of Justice ("DOJ") had recently abandoned into immigration detention facilities.[14] The DOJ had closed the private prisons after announcing its intention to "reduc[e] – and ultimately end[] – [DOJ's] use of privately operated prisons," due in part to their failure to "maintain the same level of safety and security" as Federal Bureau of Prison facilities.[15]

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[12] U.S. DEP'T OF HOMELAND SEC., HOMELAND SEC. ADVISORY COUNCIL, REPORT OF THE SUBCOMMITTEE ON PRIVATIZED IMMIGRATION DETENTION FACILITIES 6 (2016), https://www.dhs.gov/sites/default/files/publications/DHS%20HSAC%20PIDF%20Final%20Report.pdf.

[13] AMNESTY INT'L, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA 37 (2009), http://www.amnestyusa.org/uploads/JailedWithoutJustice.pdf.

[14] Matt Zapotosky, *The Justice Department Closed this Troubled Private Prison. Immigration Authorities are Reopening It.* WASH. POST (Oct. 27, 2016), https://www.washingtonpost.com/world/national-security/the-justice-department-closed-this-troubled-private-prison-immigration-authorities-are-reopening-it/2016/10/27/6e52855e-9b87-11e6-a0ed-ab0774c1eaa5_story.html?utm_term=.a21cc6889cac.

[15] Memorandum from Sally Q. Yates, Deputy Att'y Gen., to Acting Dir., Fed. Bureau of Prisons, Reducing our Use of Private Prisons (Aug. 18, 2016), https://www.justice.gov/opa/file/886311/download.

We now stand at the precipice of exponential growth in this privatized, punitive model of immigration detention. The executive branch has recently committed to deporting or "incarcerat[ing]" 2 to 3 million people.[16] To accomplish this, it has ordered DHS to "allocate all legally available resources to . . . establish contracts to construct, operate, or control facilities to detain aliens. . . ."[17] A recent memorandum to top DHS officials lays out a projected doubling of the daily immigration detainee population to 80,000.[18] Investors project robust growth in the private prison industry, driven chiefly by the continued expansion of immigration detention.[19]

Meanwhile, inside nominally "civil" detention centers throughout the country, immigrants pass months and years behind bars and in prison jumpsuits, shackled during visitation and court, subjected to surveillance and strip searches, and referred to by

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[16] *60 Minutes: The 45th President* (CBS News broadcast Nov. 13, 2016), http://www.cbsnews.com/news/60-minutes-donald-trump-family-melania-ivanka-lesley-stahl/.

[17] Exec. Order. No. 13,767: Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8793 (Jan. 25, 2017).

[18] Brian Bennett, *Not Just 'Bad Hombres': Trump is Targeting up to 8 Million People for Deportation*, L.A. TIMES (Feb. 4, 2017), http://www.latimes.com/politics/la-na-pol-trump-deportations-20170204-story.html.

[19] Tomi Kilgore, *Trump Presidency is Providing a Great Opportunity to Buy Prison Stocks*, MARKETWATCH (Jan. 20, 2017), http://www.marketwatch.com/story/trump-inauguration-highlights-best-opportunity-to-buy-prison-stocks-in-years-2017-01-19.

numbers.[20] Access to the things we take for granted – movement, fresh air, and even human touch – is restricted or denied altogether.[21] Families bear the emotional and financial brunt of months and years of separation from their loved ones.

B. In their own words, immigrants experience prolonged detention as punishment.

The deprivations of liberty inherent in immigration detention are even more severe for those trapped in prolonged mandatory detention. Some of their stories were profiled in our previous brief: Warren

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[20] *See, e.g.*, AMNESTY INT'L, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA 37-39 (2009), http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf; NAT'L IMMIGRANT JUSTICE CENTER & PHYSICIANS FOR HUMAN RIGHTS, INVISIBLE IN ISOLATION: THE USE OF SEGREGATION AND SOLITARY CONFINEMENT IN IMMIGRATION DETENTION 10-11 (2012), http://static.prisonpolicy.org/scans/Invisible.pdf; HUMAN RIGHTS FIRST, JAILS AND JUMPSUITS: TRANSFORMING THE U.S. IMMIGRATION DETENTION SYSTEM – A TWO-YEAR REVIEW 7-10 (2011), http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf.

[21] Visitation, including "contact visits," is highly restricted in immigration detention. *See, e.g.*, N.Y. UNIV. SCHOOL OF LAW IMMIGRANT RIGHTS CLINIC, ET AL., LOCKED UP BUT NOT FORGOTTEN: OPENING ACCESS TO FAMILY & COMMUNITY IN THE IMMIGRATION DETENTION SYSTEM 9-12 (2010), https://www.afsc.org/sites/afsc.civicactions.net/files/documents/LockedUpFINAL.pdf. Some facilities only permit visitation through video, and several facilities have limited or no access to outdoor recreation. *See, e.g.*, DET. WATCH NETWORK, EXECUTIVE SUMMARY: EXPOSE AND CLOSE 3 (2012), http://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Expose%20and%20Close%20Executive%20Summary.pdf.

Hilarion Joseph (detained 3.2 years), Astrid Morataya (2.5 years), Emannuel Boukari (2.5 years), Arnold Giammarco (1.5 years), Juan Santos (1.1 years), Brayan Fernandez (7 months), Sayed Omargharib (1.8 years), Lorenzo Carrillo (3 years), Ahilan Nadarajah (4.4 years), Maria Alvarez (7 months), Leandro Placencia de la Rosa (1.8 years), Horatio Gomez (2.5 years), Patrick Thaxter (2.9 years), and Sylvester Owino (9 years).

Below, some of these individuals describe their experience in immigration detention in their own words. Their stories are sadly commonplace, and are followed by others that show how prolonged immigration detention is a harshly penal system that carries grave deprivations of liberty for the individuals trapped within it.

"*It was a complete nightmare. The hardest part was being away from my wife and daughter, who was two years old at the time. Watching my daughter behind a pane of glass, I still remember her crying that she wanted me to hold her, she wanted me to play with her like I used to. But I couldn't.*"

– **Arnold Giammarco**[22]

Mr. Giammarco is a lawful permanent resident of fifty years, a husband and father to U.S. citizens, and a U.S.

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[22] Arnold Giammarco, *After 50 Years as a Legal Immigrant, I Spent 18 Months in Immigration Detention Without a Bail Hearing*, PUB. RADIO INT'L'S THE WORLD (Nov. 30, 2016), https://www.pri.org/stories/2016-11-30/after-50-years-legal-immigrant-i-spent-18-months-immigration-detention-without.

Army and National Guard veteran.[23] Read Mr. Giammarco's first-hand account about the impact of his eighteen months of prolonged detention, which convinced him to abandon a good-faith claim to citizenship and accept an order of deportation. He and his family continue to fight for the chance to be reunited: https://www.pri.org/stories/2016-11-30/after-50-years-legal-immigrant-i-spent-18-months-immigration-detention-without.

"I only saw my kids three times in the years I was locked away. A five-minute phone call with them cost twenty-five dollars. What can you really tell your family in five minutes? I was just a single mom trying to survive and keep my family united. I'll never get back that time with my children."

– Astrid Morataya[24]

Ms. Morataya is a lawful permanent resident, a survivor of sexual violence, and mother to three U.S. citizen

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[23] *Id.*; *see also* AIJ Br. at 13-15.

[24] *See* Ryan Devereaux, *A Mother's Appeal to the Supreme Court: "I Had to Fight to Stay in the Country For My Children,"* THE INTERCEPT (Nov. 30, 2016), https://theintercept.com/2016/11/30/i-had-to-fight-to-stay-in-the-country-for-my-children-a-mothers-deportation-appeal-before-the-supreme-court/; Amanda Sakuma, *SCOTUS to Decide if Indefinite Immigrant Detention is Illegal*, NBC NEWS (Nov. 30, 2016), http://www.nbcnews.com/news/us-news/scotus-decide-if-indefinite-immigrant-detention-illegal-n689541; Kristina Shull, Rachel Levenson & Terry Ding, *Last Chance This Term for the Supreme Court to Stand Up for Immigrants in Detention*, THE HILL: CONGRESS BLOG (Nov. 28, 2016), http://thehill.com/blogs/congress-blog/judicial/307662-jennings-v-rodriguez-last-chance-this-term-for-the-supreme-court.

children.[25] Hear Ms. Moratoya describe how she went from preparing her daughter for kindergarten to the shock of being detained for over two years in a county jail in her own words here: https://www.youtube.com/watch?v=Bw5zaZwVfvo.

"The conditions were extremely uncomfortable. It was a form of intimidation so we could be forced to 'sign out' and be deported. We had to make a decision between that or to stay and suffer. And we were told to do this – to give up – by the corrections officers."

– Warren Hilarion Joseph[26]

Mr. Joseph is a U.S. citizen, father, and decorated U.S. Army combat veteran.[27] Hear Mr. Joseph describe the indignities he faced in detention for over three years in a county jail as a lawful permanent resident: https://www.youtube.com/watch?v=pSz2GX6QaWs&t=323s.

"Detention centers are run the same way as jails, maybe worse. You are always cold, they never turn off the AC, they give you a mattress that is maybe an inch thick. The type of food they give you, I wouldn't even give that to my dog. You can't eat, can't sleep, can't use the

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[25] AIJ Br. at 7-9.

[26] *See* Democracy Now!, *Can the U.S. Detain Immigrants Indefinitely? Supreme Court Hears Case as Trump Prepares for Office*, YouTube (Dec. 2, 2016), https://www.youtube.com/watch?v=pSz2GX6QaWs&t=356s.

[27] AIJ Br. at 5-7.

bathroom in peace. All you see is people crying every day."

– **Alexander Lora**[28]

Mr. Lora has been a lawful permanent resident since the age of seven. When Mr. Lora was placed in mandatory immigration detention, his two-year-old U.S. citizen son was placed in foster care.[29] Hear Mr. Lora describe the harsh conditions of detention he endured before finally receiving a bond hearing that allowed him to reunite with his toddler son: https://www.youtube.com/watch?v=N-1jluidWiI.

C. Prolonged detention causes grave deprivations of liberty through physical, mental, and emotional abuse and neglect.

Individuals in prolonged detention are subjected to the punitive use of solitary confinement, restricted and substandard access to medical care, physical and sexual abuse from prison staff, coercion of labor, and deprivation of family contact. While such deprivations are commonplace in prolonged detention, they fall especially hard on vulnerable populations, including individuals with disabilities, lesbian, gay, bisexual and

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[28] Talking Eyes Media, *Prolonged Detention: A Short Documentary on the Landmark 'Lora' Case*, YouTube (Nov. 26, 2016), https://www.youtube.com/watch?v=N-1jluidWiI.

[29] AIJ Br. at 38.

transgender (LGBT) immigrants, and asylum seekers fleeing persecution.

Solitary confinement. There is perhaps no clearer example of the severe burdens on liberty caused by immigration detention than the prevalence of solitary confinement as a tool to punish and control. Solitary confinement is a "terror and peculiar mark of infamy." *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring) (quoting *In re Medley*, 134 U.S. 160, 170 (1890)). A person held in solitary confinement is locked in a cell for 23 hours a day, receives meals through a narrow slot in a sealed door, and is barred from phone calls or visits from family members or other loved ones. It is one of the most extreme punishments a person may experience in prison.

As described in our previous brief, **Ms. Morataya** twice faced solitary confinement in immigration detention: first for having a forgotten sugar packet in her uniform after mealtime, and again for lagging behind her cellmates because she had begun menstruating and was trying to find a sanitary napkin. *See* AIJ Br. at 7-8.

Ms. Morataya's experience is routine in immigration detention. According to one investigation, on any given day, approximately 300 immigrants are held in

solitary confinement at the 50 largest immigration detention facilities.[30] Half were isolated for over two weeks; 1 in 9 was isolated for over two months.[31]

Solitary confinement is often the first response to infractions of rules that only exist in prisons and jails.[32] In Essex County Correctional Facility, a penal facility that reserves 800 beds for immigration detention in Newark, New Jersey, 96% of all infractions were punished with solitary confinement from 2013 to 2015. In that same time period alone, solitary confinement was used against immigrants in detention 428 times.[33] These sentences were frequently imposed arbitrarily and disproportionately. For example, one detainee received a 12-day sentence for damaging an identification wristband, while another received a 15-day

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[30] Ian Urbina & Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. TIMES (Mar. 23, 2013), http://www.nytimes.com/2013/03/24/us/immigrants-held-in-solitary-cells-often-for-weeks.html.

[31] *Id.*

[32] NAT'L IMMIGRANT JUSTICE CENTER & PHYSICIANS FOR HUMAN RIGHTS, INVISIBLE IN ISOLATION: THE USE OF SEGREGATION AND SOLITARY CONFINEMENT IN IMMIGRATION DETENTION 17-20 (2012), http://static.prisonpolicy.org/scans/Invisible.pdf; PHYSICIANS FOR HUMAN RIGHTS, BURIED ALIVE: SOLITARY CONFINEMENT IN THE U.S. DETENTION SYSTEM 11-14 (2013), https://s3.amazonaws.com/PHR_Reports/Solitary-Confinement-April-2013-full.pdf.

[33] N.J. ADVOCATES FOR IMMIGRANT DETAINEES, ET AL., ISOLATED IN ESSEX: PUNISHING IMMIGRANTS THROUGH SOLITARY CONFINEMENT 5-6 (2016), https://www.afsc.org/sites/afsc.civicactions.net/files/documents/Isolated%20in%20Essex%20Full%20Report%202016_1.pdf.

sentence for refusing to close his food port after he found worms in his meal.[34]

Solitary confinement has serious mental health effects, even when imposed for relatively short periods of time. These include hallucinations, panic attacks, paranoia, and suicidal ideation.[35] For long-term immigration detainees experiencing trauma from previous persecution and torture, such mental health dangers are only exacerbated.

Medical neglect. Immigrants with serious health conditions are subject to inadequate care and even fatal neglect when held in immigration prisons and jails for prolonged periods. Such victims of inadequate care include people like **Mr. Joseph**, a decorated combat veteran whose wartime injury to his foot flared up during his detention at Hudson County Correctional Facility in New Jersey. *See* AIJ Br. at 5-6. Mr. Joseph ultimately required surgery after years of requests for proper care went unheeded. *Id.*

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[34] *Id.* at 6.

[35] Peter S. Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 502 (2006) (noting that "[a] long list of possible symptoms from insomnia and confusion to hallucinations and outright insanity has been documented" among people subjected to solitary confinement); Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325 (2006) (noting that anxiety, panic, withdrawal, hallucinations, self-mutilation, and suicidal thoughts and behaviors are all associated with solitary confinement).

Mr. Joseph's experience at Hudson is not unique. In May 2016, a civil rights complaint was filed against the facility due to a pattern and practice of substandard medical care that included delayed or denied treatment, overmedication of detainees that put them in coma-like states, and unsanitary conditions that caused the spread of bacterial infections.[36] Consider the experience of **Salvador Venegas**,[37] who was detained for a year and a half at Hudson:

> Mr. Venegas, a lawful permanent resident of almost three decades, had a serious preexisting medical condition that was known to Hudson officials when he was taken into immigration custody. Although he was at high risk of cancer due to this condition, he was never given an appropriate medical screening. Shortly after his detention began, Mr. Venegas began to experience acute pain.
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> Over the following months, Mr. Venegas developed spreading pain, bleeding, stiffness and numbness, and swollen feet. He repeatedly informed Hudson staff of his worsening condition, but was only treated with over-the-counter medications. A full year after the

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[36] Nina Bernstein, *Health Care at New Jersey Jail Is Substandard, Watchdog Groups Say*, N.Y. TIMES (May 11, 2016), https://www.nytimes.com/2016/05/12/nyregion/health-care-at-new-jersey-immigrant-jail-prompts-claim.html?_r=0.

[37] The name "Salvador Venegas" is a pseudonym to protect Mr. Venegas's privacy. The facts of his case are detailed in a declaration by his legal counsel. *See* Decl. of Terry Ding of the NYU Immigrant Rights Clinic (on file with amici).

> symptoms started, he was diagnosed with advanced stage cancer by outside physicians. He spent eighteen painful months in detention with inadequate treatment, and only was able to begin necessary chemotherapy after his release.

People with serious physical disabilities also receive inadequate treatment in immigration detention. **Gerardo Corrales**,[38] who is paraplegic and wheelchair-bound, was nineteen years old when he was put into detention. He suffered a life-threatening infection due to the facility's lack of medical care:

> Mr. Corrales has lived in the United States since he was two years old. In 2014, a few weeks before his high school graduation, he was the victim of an indiscriminate drive-by shooting that left him paralyzed below his waist. Local police raided his family's home while he was still in the early stages of his recovery. Arrested for possession of an anti-anxiety medication without a prescription, Mr. Corrales was turned over to immigration custody and put into mandatory detention in Adelanto Detention Center because of a conviction from his youth.

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[38] The facts of Mr. Corrales's case are described in an affidavit by an attorney familiar with the case. *See* Affidavit of Christina Fialho, Letter from 29 Members of Congress to Sarah Saldaña, Director, Immigration and Customs Enforcement (June 22, 2015), http://chu.house.gov/sites/chu.house.gov/files/documents/Gerardo_Corrales_Affidavit_Fialho.pdf.

Adelanto failed to provide even a minimal level of accommodation for Mr. Corrales's serious disability. He was forced to reuse catheter bags and consequently developed a severe urinary tract infection that required hospitalization. Doctors informed Mr. Corrales that he was suffering from kidney failure and could have died from the infection without prompt medical attention. Yet even after his return to custody from the hospital, Adelanto staff continued to deny him sufficient catheter bags. When his infection caused him to urinate in his pants, detention staff refused to provide him a change of clothing.

Nor did Mr. Corrales receive assistance with his daily living needs or the physical therapy essential to his recovery process. Instead, he was entirely dependent on other detained men to help him use the bathroom, wash himself, and pick himself up when he fell from his wheelchair. Throughout his detention, his attorneys repeatedly alerted ICE and DHS authorities of the medical neglect and mistreatment he was subjected to. They never received a substantive response.

After nine months of detention, Mr. Corrales was finally released on a *Rodriguez* bond and is now under the care of his family. He is currently seeking a special visa for crime victims who assist law enforcement and is applying for college.

Physical, emotional, and sexual abuse. Many immigrants in prolonged detention experience physical, emotional, and sexual abuse.[39] From 2007 to 2011, there were nearly 200 reports of sexual assault in immigration detention centers across the country.[40] One Texas correctional officer was accused of sexually assaulting nine different detained women.[41] In Baker County Detention Center in Florida, a young Haitian immigrant reported that after he requested that the air conditioning be adjusted, a correctional officer became enraged, saying "I'm tired of you . . . immigrants coming to my country thinking you can get what . . . you want." The officer proceeded to pin him down, place him in handcuffs, and twist his genitals.[42]

LGBT immigrants face particularly high risks of abuse, and in detention many find themselves victims

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[39] *See, e.g.*, SOUTHERN POVERTY LAW CENTER, ET AL., SHADOW PRISONS: IMMIGRANT DETENTION IN THE SOUTH 14-16 (2016), https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf; NATIONAL PRISON RAPE ELIMINATION COMMISSION, NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 21-23 (2009), https://www.ncjrs.gov/pdffiles1/226680.pdf; HUMAN RIGHTS WATCH, DETAINED AND AT RISK: SEXUAL ABUSE AND HARASSMENT IN UNITED STATES IMMIGRATION DETENTION 8-14 (2010), https://www.hrw.org/sites/default/files/reports/us0810webwcover.pdf.

[40] Press Release, Am. Civil Liberties Union, ACLU of Texas Today Files Federal Lawsuit on Behalf of Women Assaulted at T. Don Hutto Detention Center (Oct. 19, 2011), https://www.aclu.org/news/documents-obtained-aclu-show-sexual-abuse-immigration-detainees-widespread-national-problem?redirect=immigrants-rights-prisoners-rights-prisoners-rights/documents-obtained-aclu-show-sexual-abuse.

[41] *Id.*

[42] *See* SHADOW PRISONS, *supra* note 38, at 47.

of the same persecution they fled in their home countries. **Gretta Soto Moreno,**[43] a transgender asylum seeker, suffered sexual assault and years of beatings and threats before fleeing to the U.S.:

> Ms. Soto Moreno was detained for three years, two of them in an all-men's unit in Eloy Detention Center in Arizona. There, she was subject to strip searches by male guards who touched her inappropriately, and frequent, demeaning insults from the guards and other inmates. She filed repeated grievances, to little result.
>
> After two years of daily abuse, ICE transferred Ms. Soto Moreno to a segregated unit for LGBT detainees in the Santa Ana City Jail in Southern California. No longer in an all-men's unit, Ms. Soto Moreno hoped that her treatment would improve. But she found that the full body cavity searches at Santa Clara were even more frequent and invasive than at Eloy, and performed by guards who told her and other asylum-seekers to "act male" and use their "male voices." In both facilities, Ms. Soto Moreno was denied access to sufficient hormonal therapy medications.

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[43] The facts of Ms. Soto Moreno's case are detailed in Brief for Appellant at 3-6, *Moreno v. Lynch*, 624 F. App'x 531 (9th Cir. 2015) (No. 14-72395). *See also* Tizinia Rinaldi, *She Fled Abuse in Mexico, and Now This Trans Woman Says She Was Abused in Immigration Detention Too*, PUB. RADIO INT'L'S THE WORLD (Apr. 14, 2016), https://www.pri.org/stories/2016-04-14/after-almost-three-years-immigration-detention-and-abuse-transgender-woman-looks.

> In 2016, Ms. Soto Moreno won her Ninth Circuit appeal, was released on a *Rodriguez* bond, and placed on an electronic monitor. She now lives in Los Angeles, studying for her high school diploma while she awaits the outcome of her asylum case.

Forced labor. Many private prisons and county jails depend on detained immigrants to work to maintain their facilities, often at no pay or for a mere $1 per day.[44] **Pedro Guzmán,**[45] the father of a young U.S. citizen son, was coerced into working for $1 a day under threat of solitary confinement during his nineteen months in immigration detention:

> Mr. Guzmán came to the United States at eight years old with his mother, through whom he had immigration status. As a young man he moved to Minneapolis, where he fell

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[44] Ian Urbina, *Using Jailed Migrants as a Pool of Cheap Labor*, N.Y. TIMES (May 24, 2014), https://www.nytimes.com/2014/05/25/us/using-jailed-migrants-as-a-pool-of-cheap-labor.html.

[45] *See* Urbina, *supra* note 44; Elise Foley, *Immigrant Freed From 19-Month Detention: 'I Treat My Dogs Much Better Than The Detainees Are Treated'*, HUFFINGTON POST (May 18, 2011), http://www.huffingtonpost.com/2011/05/18/immigrant-freed-from-detention_n_863893.html; Richard Fausset, *Could He be a Good American?*, L.A. TIMES (June 4, 2011), http://www.latimes.com/nation/la-na-deportation-story-htmlstory.html; Yana Kunichoff, *"Voluntary" Work Program Run in Private Detention Centers Pays Detained Immigrants $1 a Day*, TRUTHOUT (July 27, 2012), http://www.truthout.org/news/item/10548-voluntary-work-program-run-in-private-detention-centers-pays-detained-immigrants-1-a-day; Kelsey Sheehy, *Saga Highlights Kinks in Immigrant Detention System*, SAN DIEGO TRIB. (Apr. 23, 2011), http://www.sandiegouniontribune.com/sdut-saga-highlights-kinks-in-immigrant-detention-2011apr23-story.html.

in love with Emily, a U.S. citizen. They married and their son Logan was born in 2006. Mr. Guzmán worked as a chef to support his family.

In 2009, after immigration officials sent a court notice informing Mr. Guzmán that he had lost his status to an incorrect address – a mistake they later admitted – an immigration judge ordered him removed in absentia.

Later that year, while Mr. Guzmán was loading his car with donation bags to take toGoodwill, ICE officers arrested him, handcuffing him in front of Emily and the then three-year-old Logan. An immigration judge subsequently found that Mr. Guzmán's two teenage misdemeanor marijuana convictions consigned him to mandatory detention.

Mr. Guzmán was detained in Stewart Detention Center in Georgia, a private prison operated by the Corrections Corporation of America ("CCA"). To visit him, Emily and Logan had to drive ten hours each way from their family's home in North Carolina. At Stewart, Mr. Guzmán was put to work in the kitchen, where his shift began every morning at 2 a.m. If he was late, the guards threatened him with solitary confinement. At one point, he was forced to work when sick with fever. For this and his other work cleaning communal areas, painting walls, and processing paperwork, he was paid $1 a day. All of Mr. Guzmán's earnings went straight back into the coffers of CCA, since he had no choice but

> to purchase food, basic hygiene products, and phone cards to call his family from the CCA-run commissary.
>
> Finally, after more than a year and a half in detention, Mr. Guzmán was released in May 2011 when he was granted cancellation of removal. Although he is now a lawful permanent resident, Mr. Guzmán and his family are tens of thousands of dollars in debt due to the legal fees and lost income incurred during his lengthy detention.

Collective punishment. Prolonged mandatory detention also inflicts harsh burdens upon the families of those detained. Deprived of the emotional and financial support of their loved ones for months and years, family members are evicted from their homes and separated, children are forced to transfer schools and often suffer psychological trauma, and savings are exhausted on legal fees and travel costs to visit those detained in facilities hours away from their homes. *See* AIJ Br. at 4-12.

Several of the stories we previously shared with the Court illustrate this reality. For example, before he was detained, **Patrick Thaxter** supported his family, including his five U.S. citizen children, by working as a chef at a Caribbean restaurant. After Mr. Thaxter was placed in detention because of a marijuana-related conviction for which he received no jail time, his family was unable to afford rent and was evicted. Forced to move in with other family in Georgia a thirteen-hour drive away, his children suffered academic and social

disruptions and were no longer able to visit him in detention. AIJ Br. at 32-33.

When **Arnold Giammarco** was detained, his family could only visit him once a week due to the length and expense of the trip, and after depleting his modest college fund for their daughter and his parents' pension fund to pay for legal fees, Mr. Giammarco decided to accept deportation to prevent further burdening his family. AIJ Br. at 13-14.

Alexander Lora's two-year-old son was put into foster care when Mr. Lora was put into detention. After Mr. Lora was released, it took another year of legal battles before he could be formally reunited with his son. AIJ Br. at 38.

II. The Indeterminate Length Of Prolonged Immigration Detention Exacerbates Its Punitive Effects.

This Court has previously recognized that "indefinite detention of an alien would raise a serious constitutional problem." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). In distinguishing *Zadvydas* from the constitutional challenge to mandatory detention in *Demore*, this Court noted that detention prior to a removal order has a "definite termination point": the entry of a removal order. *Demore*, 538 U.S. at 529.

But while the possibility of a removal order provides a theoretical termination point, it does not make the term of prolonged mandatory detention any more

"definite." *See Definite*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/definite (defining "definite" as "having distinct or certain limits" and "free of all ambiguity, uncertainty, or obscurity"). Noncitizens in prolonged mandatory detention have no certainty as to when they will be released. The actual length of detention often depends on factors over which they have no control, such as legal errors committed by adjudicators and delays in immigration court scheduling. Such indefinite terms of incarceration inflict real physical and psychological harms on individuals who present neither flight risks nor dangers, and the families from which they are separated.

A. The indeterminate length of prolonged detention inflicts physical and psychological harms.

Indeterminacy of prolonged detention is not a mere inconvenience. It causes specific, recognizable harms. *See* Brief of Social Science Researchers and Professors at 10-17, *Jennings v. Rodriguez*, No. 15-1204 (filed Oct. 24, 2016). The generally poor conditions of confinement inflict an increasing toll on the health and physical wellbeing of those detained the longer they remain in custody. *Id.* at 10. Moreover, the uncertainty that they face about when or whether they will be released "frequently leads to high rates of anxiety, despair, and depression" that over time "often manifest themselves as diagnosable mental health conditions." *Id.* at 17. The specific anguish of detention without a definite termination point results in "physical, social

and emotional problems [that] continue to plague individuals long after their release. . . ." *Id.*

There was no definite termination point for any of the individuals profiled in our previous brief who were denied the opportunity for bond hearings. And for many, their prolonged detentions were a direct result of legal errors committed by adjudicators in their cases. **Mr. Joseph** spent three years seeking cancellation of removal before the Third Circuit overturned an immigration judge's erroneous determination that he was ineligible for immigration relief. AIJ Br. at 7. **Ahilan Nadarajah** waited nearly four and a half years in detention for resolution of his asylum case, which took two federal appellate reversals to correct. AIJ Br. at 23-24. The removal order in the case of **Sylvester Owino**'s – detained for nine years – has been to the Ninth Circuit twice and is now back before the Immigration Court on remand, where it remains pending today. AIJ Br. at 40-41.

Federal court review of erroneous administrative decision-making is not the only cause of prolonged detention. Detention is frequently prolonged long *before* an immigrant exercises her right to a federal court appeal. It took an immigration judge fifteen months to decide **Emannuel Boukari**'s application for asylum, withholding, and relief under the Convention Against Torture, another seven months for the Board of Immigration Appeals to reverse the erroneous denial, and a further four months to grant the application. AIJ Br. at 9-10. There was no clear termination point in Mr. Boukari's case at the outset, only the uncertainty that

he may remain in detention for months or years simply to receive the protection from removal that the law provides.[46]

B. Coerced deportation caused by indefinite detention of individuals with substantial claims to relief is a grave burden on liberty.

The government suggests that prolonged detention may be escaped by simply accepting an order of removal. Gov't Second Br. at 13 ("Of course, the government allows aliens in immigration detention pending removal proceedings to end those proceedings, at any time, by accepting a final order of removal, qualifying for voluntary departure, or, in some circumstances, by simply returning home."). Such a position greatly undervalues the severe burdens to liberty that accompany removal of an individual with a substantial claim to relief.

As the stories of our clients and community members illustrate, acceptance of deportation in order to escape prolonged detention imposes life-altering burdens

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[46] The government suggests that no process in prolonged detention was due these individuals because they chose to litigate their cases. Gov't Second Br. at 41 (arguing that "aliens' litigation choices considerably extended their proceedings . . . but that simply illustrates that there is a correspondingly good reason to extend the length of the detention during those proceedings"). But had they chosen not to litigate, they would have abandoned meritorious claims, a result at odds with the government's own interest in providing qualified individuals with relief to removal.

on constitutional liberties. These include the ability to care for family, live in the home one has purchased, and contribute to longtime communities.

For example, **Brayan Fernandez**, a lawful permanent resident, accepted an order of removal to Mexico in order to escape his seven-month detention. Though he qualified for a family-based visa that would have allowed him to remain lawfully in the United States, the visa petition sat dormant for months after submission, and was not adjudicated until one month after his deportation. Today, his U.S. citizen wife and three children live in permanent separation from their husband and father. *See* AIJ Br. at 16-17.

The indefinite nature of prolonged detention is also why **Mr. Giammarco** now faces permanent separation from his U.S citizen wife and daughter. After eighteen months of detention, he accepted an order of removal to Italy, a country he had not lived in since he was four years old and where he barely speaks the language. Without a stable job, he helps with maintenance on a house in a small village in exchange for a room to sleep in, but is unable to provide financial support to his family. Though his wife has worked three jobs to save money to visit him, she and their daughter have only been able to afford to see him twice in the four years since he was deported. *See* AIJ Br. at 13-14.

III. Only A Bond Hearing Remedies The Unconstitutional, Prolonged Detention Of People In Punitive Conditions.

In light of the harms described above, a finding of flight risk or dangerousness by a neutral arbitrator is the minimum procedural protection required to protect against unconstitutionally prolonged detention. The government argues that the process afforded immigrants in removal proceedings is more than enough to address the concerns of detention. Gov't Second Br. at 2, 7-10.

However, as detailed above, detention itself implicates serious liberty interests above and beyond the stakes in removal proceedings. Acknowledging this fact, the government instead points to humanitarian parole for "arriving aliens" held under 8 U.S.C. § 1225(b) and "*Joseph* hearings" for lawful permanent residents and other noncitizens subject to "mandatory detention" under 8 U.S.C. § 1226(c) as adequate protective mechanisms. *Id.* at 10-13. But neither of these processes affords immigrants with an individualized finding of flight risk or dangerousness by a neutral arbitrator – i.e., a bond hearing. And the government's backup solution – individualized habeas petitions in "extraordinary" cases – would render any path to a bond hearing meaningless for people experiencing prolonged detention. *Id.* at 45-47.

For "arriving aliens" detained under § 1225(b), the government points to the availability of humanitarian

parole. Gov't Second Br. at 10. But humanitarian parole is an unreviewable decision made by the jailer, not a neutral arbitrator, and its use can vary dramatically depending on the political climate. *See* AIJ Br. at 21-27.[47] The parole process was no remedy for people like **Ahilan Nadarajah** and **Emannuel Boukari**, profiled in our previous brief, both of whom won their cases, but only after repeated denials of release on parole with little explanation and no review. AIJ Br. at 9-10, 23-24.

Bond hearings, by contrast, provide a meaningful inquiry. Consider **Gloria Cervantes**, a wife and mother fleeing horrific violence, who was denied humanitarian parole five times in boilerplate, unreviewable decisions. After receiving a *Rodriguez* hearing, she was promptly released on $1,500 bond. *Id.* at 35-36.

For immigrants subject to mandatory detention under § 1226(c), the government notes the existence of "*Joseph* hearings" – hearings that provide no inquiry into flight risk or dangerousness, but merely confirm

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[47] As we noted in our previous brief, data shows that parole grant rates for asylum seekers who passed a credible fear interview have dramatically decreased from eighty percent in 2012 to forty-seven percent in 2015. AIJ Br. at 22. A recent Executive Order suggests that humanitarian parole will be even more limited for immigrants at the border. *See* Exec. Order. No. 13,767: Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8793 (Jan. 25, 2017).

whether an individual's conviction triggers the detention statute. Gov't Second Br. at 11-12.[48] *Joseph* hearings thus provide no remedy for people like **Sayed Omargharib**, a father and successful hair stylist whose single conviction (for stealing two pool cues at a local pool hall) was ultimately deemed by a federal court to not be a removable offense. AIJ Br. at 19-20. Because the immigration judge in his case had determined that his conviction would make him removable and subject to mandatory detention, a *Joseph* hearing provided no protection from the nearly two years of detention he endured before the Fourth Circuit reversed the immigration judge's order due to faulty legal reasoning. At no point during Mr. Omargharib's detention did the government ever inquire as to his flight risk or dangerousness. Denied the ability to work and pay his

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[48] The government also suggests that "criminal aliens" as a whole have more diminished due process rights, contending that most concede removability, without providing any proof to that effect. As amici explain in their brief, many of the people impacted by prolonged detention are by definition pursuing their claims to remain in the U.S., and many have lawful status and significant ties to the U.S. For example, data from *Lora* bond hearings for so-called "criminal aliens" in the Second Circuit demonstrate that sixty-nine percent are lawful permanent residents, seventy-nine percent have a U.S. citizen spouse or child, and the average length of residence in the U.S. is twenty-two years. VERA INSTITUTE OF JUSTICE, ANALYSIS OF *LORA* BOND DATA: NEW YORK IMMIGRANT FAMILY UNITY PROJECT 3-4 (2016), http://www.law.nyu.edu/sites/default/files/upload_documents/Vera%20Institute_Lora%20Bond%20Analysis_Oct%20%202016.pdf. Moreover, the government appears to conflate the liberty interests relating to removal proceedings with the government's decision to incarcerate immigrants during those removal proceedings. *See Zadvydas*, 533 U.S. at 721.

mortgage by his prolonged detention, Mr. Omargharib was left homeless upon his release.

Bond hearings ensure that such arbitrary deprivations of liberty do not occur. **Mark Hwang** was found to be neither dangerous nor a flight risk at his *Rodriguez* bond hearing. AIJ Br. at 34. Upon release, he was able to resume work and care for the twin daughters his wife gave birth to shortly before he was detained. Both Mr. Omargharib and Mr. Hwang won their removal cases. But because Mr. Hwang had access to a bond hearing, he was able to avoid the devastating consequences that befall individuals who are neither flight risks nor dangerous, yet still held in prolonged detention.

Part of what made bond hearings in Ms. Cervantes's and Mr. Hwang's cases an effective safeguard of due process was the automatic access to such hearings within six months. AIJ Br. at 33-41. The government's alternative remedy is much different. Not only does the government push the boundaries of permissible mandatory detention well past six months, it proposes a case-by-case remedy to prolonged detention that would require an individual to wait for her detention to become prolonged and then file and litigate a habeas corpus petition. Gov't Second Br. at 46-47. Such a process merely compounds the constitutional injury caused by prolonged detention because district courts themselves require prolonged periods to adjudicate those petitions. As noted in our previous brief, those times may range from 237 days, to 168 days, to 409

days, to 578 days in the First, Third, Sixth and Eleventh Circuits, respectively, for the federal court litigation alone. AIJ Br. at 31.

This is why **Horatio Gomez**, a U.S. citizen, spent over two-and-a-half years in immigration detention, including one year *after* filing a habeas petition. *Id.* at 29-30. Habeas was also an ineffective remedy for **Patrick Thaxter**, whose petition was pending for over 17 months – more than half the length of his total detention – before it was granted. *Id.* at 32-33.

This Court has previously noted how "[l]iberty protects the person from unwarranted government intrusions. . . ." *Lawrence v. Texas*, 539 U.S. 558, 562 (2003). Surely, prolonged detention in conditions that are materially indistinguishable from punishment is a "government intrusion." A bond hearing in which the government bears the burden of persuasion is a proper procedural protection because it is the only way to ensure that such intrusion is not "unwarranted."

The Ninth Circuit's remedy of such a hearing for individuals facing six months of detention is the proper way to vindicate the substantial liberty interest at stake. By not requiring the filing of a habeas petition to secure a bond hearing, the Court of Appeals eliminates substantial periods of unjustified detention that would accrue while waiting for a district court decision.

CONCLUSION

As the stories of our clients and community members illustrate, the liberties at stake in prolonged mandatory detention are profound: freedom from unlawful restraint, contact with family and loved ones, and the ability to lawfully remain in the only country many immigrants have ever known as home. The constitutional rights of our clients and community members should be recognized by, at the very least, the minimal protection of access to a bond hearing.

Respectfully submitted,

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APPENDIX

DESCRIPTIONS OF AMICI CURIAE

Americans for Immigrant Justice

Americans for Immigrant Justice, formerly Florida Immigrant Advocacy Center, is a non-profit law firm dedicated to promoting and protecting the basic rights of immigrants. Americans for Immigrant Justice is dedicated to advancing and defending the rights of immigrants in detention.

Black Alliance for Just Immigration

The Black Alliance for Just Immigration ("BAJI") is a national organization that organizes, advocates, and raises awareness around issues facing Black immigrants, including immigrants from Africa, the Caribbean, and elsewhere, in the United States. For over a decade BAJI has engaged Black communities to advance the interests of immigrants facing detention and deportation.

Boston College Law School Immigration Clinic

The Boston College Law School Immigration Clinic ("BC Immigration Clinic") is a clinical program of Boston College Law School. The BC Immigration Clinic regularly represents clients who are detained by the Immigration and Customs Enforcement; in these cases, students represent clients both in their removal proceedings and bond hearings. As such, the BC Immigration Clinic has an interest in ensuring that more

detainees are entitled to a bond hearing and that the procedures used in such bond hearings are fair and adequately protect detainees' liberty interests.

Boston University's Immigrants' Rights Clinic

Boston University's Immigrants' Rights Clinic ("IRC") is a law school clinic that provides direct representation to immigrants in removal proceedings, including individuals who face detention without bond pending removal proceedings. IRC has held legal orientation projects within immigrant detention centers and has a longstanding interest in promoting the rights of immigrants in detention.

Brandeis Human Rights Advocacy Program of the University of Louisville School of Law

The Brandeis Human Rights Advocacy Program of the University of Louisville School of Law works actively with the local community, non-profits and stakeholders in the community to advance the human rights of immigrants, refugees and noncitizens.

Bronx Defenders

Founded in 1997, The Bronx Defenders provides innovative, holistic, and client-centered criminal defense, removal defense, family defense, social work support and other civil legal services and advocacy to indigent Bronx residents. Under the New York Immigrant Family Unity Project, we represent over 330 detained

non-citizens every year and witness the adverse impact of prolonged detention on our clients, their ability to pursue legal claims to stay in this country, and their families.

Brooklyn Defender Services

Brooklyn Defender Services ("BDS") is a public defender organization that represents more than 45,000 people every year who cannot afford an attorney in criminal, family, and immigration proceedings. Since 2013, BDS has provided removal defense services through the New York Immigrant Family Unity Project New York's first-in-the-nation appointed counsel program for detained New Yorkers facing removal who cannot afford an attorney. BDS represents Alexander Lora, the petitioner in *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015) in his removal proceedings, and represented him before the federal district court and circuit court.

Center for Community Change

The Center for Community Change ("CCC") is a national not-for-profit organization that works to empower low-income people, particularly in communities of color, to make change that improves our communities and public policy. CCC has a longstanding history of advancing and defending the rights of immigrants. CCC coordinates the Fair Immigration Reform Movement (FIRM), a network of 42 member organizations in 33 states, working to keep families together and fix

our nation's broken immigration system. As part of this work, we have encountered countless numbers of immigrant community members who have had their lives ripped apart because of prolonged detention. We have witnessed firsthand the devastating impact detention has on immigrant families.

Center for Constitutional Rights

The Center for Constitutional Rights ("CCR") is a national non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international human rights law. Founded in 1966, CCR has a long history of litigating cases on behalf of those with the fewest protections and least access to legal resources, including numerous landmark civil and human rights cases fighting for racial and immigrant justice and protection from indefinite detention and solitary confinement.

Center for Gender & Refugee Studies

The Center for Gender & Refugee Studies ("CGRS") at the University of California Hastings College of the Law works to protect the fundamental human rights of asylum seekers, with a particular focus on expanding protection for women, children, and LGBT individuals. CGRS has played a central role in the development of law and policy related to asylum seekers, including on detention and enforcement issues.

Coalition for Humane Immigrant Rights of Los Angeles

The Coalition for Humane Immigrant Rights of Los Angeles ("CHIRLA") is a non-profit organization with local and state presence in California, and national recognition. Our mission is to advance the human, civil rights, and full integration of New Americans and their children into the fabric of our society.

Community Initiatives for Visiting Immigrants in Confinement

Community Initiatives for Visiting Immigrants in Confinement ("CIVIC") is the national immigration detention visitation network, which is working to end U.S. immigration detention by monitoring human rights abuses, elevating stories, building community-based alternatives to detention, and advocating for system change. CIVIC has a longstanding interest in this Court's decision and has been advocating for years against the lengthy detention of noncitizens held in pre-removal immigration detention in the United States. *See, e.g.*, Rethinking Pre-removal Immigration Detention in the United States: Lessons from Europe and Proposals for Reform, *Oxford University Press – Refugee Survey Quarterly* (2012) 31 (3):69-100, doi:10.1093/rsq/hds007, *available at* http://tinyurl.com/hds007.

Community Justice Clinic of the University at Buffalo School of Law

Community Justice Clinic of the University at Buffalo School of Law ("CJC") is a law school clinic that represents immigrants, including individuals who are subject to the mandatory detention provisions of the Immigration and Nationality Act. CJC also represents and works with immigrant-led organizations with members who have been subject to prolonged detention.

Community Legal Services in East Palo Alto

Community Legal Services in East Palo Alto ("CLSEPA") is a nonprofit organization that provides legal assistance to low income immigrants in and around East Palo Alto, California, where two-thirds of the population is Latino or Pacific Islander. The immigration team provides consultations to and represents local residents in various types of immigration benefits and proceedings, including detained and non-detained removal proceedings in immigration court.

Criminal/Immigration Defense Clinic at Colorado Law School

The Criminal/Immigration Defense Clinic at Colorado Law School is a law clinic that represents indigent clients charged with misdemeanor offenses in Boulder County, CO. We have witnessed first-hand the devastating impacts of prolonged detention on immigrants

while they pursue their ability to remain in the U.S. with their families.

Cumberland Legal Aid Clinic

The Cumberland Legal Aid Clinic, through its Refugee and Human Rights clinical program, is a law-school based clinic in which law students represent immigrants fleeing human rights abuses who wish to remain in the U.S. The clinic regularly represents immigrants who face detention and are seeking asylum, withholding of removal, protection under the Convention against Torture, special immigrant juvenile status, protection under the Violence Against Women Act or adjustment of status. We are intimately familiar with the adverse impact prolonged detention has on an immigrant's ability to defend against removal.

Detention Watch Network

As a national coalition of organizations and individuals concerned about the impact of immigration detention on individuals and communities in the United States, Detention Watch Network ("DWN") has a substantial interest in the outcome of this litigation. Founded in 1997, DWN has worked for nearly two decades to fight abuses in detention, and to push for a drastic reduction in the reliance on detention as a tool for immigration enforcement. Since 2011, through its advocacy and organizing work, DWN has been

advocating for the elimination of all laws mandating the detention of immigrants.

Dolores Street Community Services

Dolores Street Community Services ("DSCS") provides pro bono removal defense to low-income immigrants in San Francisco, CA, specializing in representing particularly vulnerable clients. DSCS clients have suffered the severe consequences of prolonged detention; some clients have accepted removal orders despite fears of persecution and other compelling claims for relief, simply because they could no longer endure detention. Other clients have experienced the incalculable benefits of an individualized custody determination, often released on their own recognizance or minimal bond after six months of unreviewed custody.

Grassroots Leadership

Grassroots Leadership is an Austin, Texas-based national organization that works to end prison profiteering and reduce reliance on criminalization and detention. Grassroots Leadership has long advocated for community-based alternatives to detention, particularly for vulnerable populations including asylum-seeking women and families. We have also witnessed the impact of prolonged detention on migrants and their families after they have been released from detention and as they attempt to integrate into the community.

Immigrant Defense Project

Immigrant Defense Project ("IDP") is a not-for-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants accused and convicted of crimes. IDP provides defense attorneys, immigration attorneys, immigrants, and judges with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law.

Immigrant Justice Corps

Immigrant Justice Corps ("IJC") is the country's first immigration legal fellowship program. IJC seeks to expand access to counsel by increasing the quantity of immigration lawyers and the quality of the immigration bar. IJC's fellows regularly represent detained noncitizens and have seen the impact of long-term detention on their clients' well-being and their ability to pursue relief.

Immigrant Rights Clinic of Washington Square Legal Services, Inc.

Immigrant Rights Clinic of Washington Square Legal Services, Inc. ("IRC") is a law clinic that represents and works with immigrants and immigrant rights organizations, including individuals who face detention without bond pending removal proceedings. IRC has a longstanding interest in advancing and defending the rights of immigrants in detention.

Immigrants' Rights Clinic of Morningside Heights Legal Services, Inc.

Immigrants' Rights Clinic of Morningside Heights Legal Services, Inc. is a law clinic that represents immigrants, including individuals in detention. IRC is committed to advocating on behalf of and advancing the rights of immigrants in detention.

Immigration Clinic of the University of Miami School of Law

Immigration Clinic of the University of Miami School of Law is a law clinic that advocates on behalf of immigrants in a wide variety of administrative and federal court immigration proceedings and collaborates with immigrant rights groups on projects to advance the cause of social justice for immigrants. Many of the clinic's clients are detained. The clinic has challenged the lawfulness of the prolonged detention of its clients in U.S. District Court and appeared as counsel for *amici curiae* in *Sopo v. U.S. Atty Gen.*, 825 F.3d 1199 (2016).

Irish International Immigrant Center

The Irish International Immigrant Center ("IIIC") is a multi-service welcome center for immigrants of all nationalities, based in Boston, Massachusetts. Originally founded in 1989 to serve the needs of Irish immigrants in the New England area, the IIIC now annually provides immigration, education, and social services to thousands of immigrants from around the world.

Kathryn O. Greenberg Immigration Justice Clinic at the Benjamin N. Cardozo School of Law

The Kathryn O. Greenberg Immigration Justice Clinic at the Benjamin N. Cardozo School of Law ("IJC") is a law clinic that represents individuals facing deportation, as well as community-based organizations, in both public policy and litigation efforts. IJC has a long-established interest in fighting for the rights of immigrants pursuing their ability to remain in the U.S., including representing people who face detention without bond pending removal proceedings.

LatinoJustice PRLDEF

LatinoJustice PRLDEF is a national not-for-profit civil rights legal defense fund which has defended the constitutional rights, civil rights and the equal protection of all Latinos under law. Since 1972, PRLDEF's mission has been to promote civic participation, to cultivate Latino leaders, and to promote voting rights, employment opportunity, language rights, educational access, and immigrants' rights.

Lawyers' Committee for Civil Rights of the San Francisco Bay Area

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area ("LCCR") is a non-profit legal services and social justice organization that works in partnership with the private bar to protect and advance the rights and status of people of color, low-income communities, and immigrants and refugees

through direct legal services, impact litigation, and policy advocacy. As part of LCCR's core commitment to protecting the rights of asylum-seekers, it has a strong interest in preventing the harmful effects of prolonged detention on noncitizens and their ability to fairly defend themselves in removal proceedings.

Legal Aid Society of New York

The Legal Aid Society of New York was founded in 1876 to serve New York's immigrant community and is the nation's oldest and largest not-for-profit law firm for low-income persons. For several decades, Legal Aid has maintained an Immigration Law Unit ("ILU") within its Civil Practice. The ILU has an expertise in representing immigrants at the intersection of criminal and immigration law and has also represented, and served as amicus on behalf of, immigrants seeking release from prolonged and mandatory detention in habeas and other federal court proceedings.

Loyola University New Orleans College of Law Clinic

The Loyola University New Orleans College of Law Clinic has operated an Immigration Clinic for decades. Louisiana is home to three major immigration detention centers and has a growing population of immigrants. Our Immigration Clinic has been providing assistance to people in the Deep South outside of Louisiana as well.

Make the Road New York

Make the Road New York ("MRNY") is a nonprofit, membership-based community organization that integrates adult and youth education, legal and survival services, and community and civic engagement, in a holistic approach to help low-income New Yorkers improve their lives and neighborhoods. MRNY is at the forefront of numerous initiatives to analyze, develop, and improve civil and human rights for immigrant communities, including issues related to detention and deportation of immigrant communities.

National Latina Institute for Reproductive Health

The National Latina Institute for Reproductive Health ("NLIRH") is a not-for-profit organization dedicated to advancing the health, dignity, and justice for the 28 million Latinas, their families, and their communities in the United States. NLIRH has a longstanding history of working to ensure fair treatment of women, children, and families, irrespective of legal status. As part of its work, it recognizes the direct impact immigration status has on access to reproductive health care. The deprivation of rights, family disruption, inadequate access to health care, loss of livelihood, re-traumatization and abuse that are inherent to conditions of confinement, are only exacerbated through prolonged detention.

Neighborhood Defender Services of Harlem

Neighborhood Defender Services of Harlem is a public defense organization that represents non-citizens who are arrested in New York City. Specifically, the Immigration Practice, represents non-citizens in removal proceedings, including individuals who are held in immigration detention without bond.

New York Immigration Coalition

The New York Immigration Coalition ("NYIC") is an advocacy and policy umbrella organization for more than 175 multi-ethnic, multi-racial, and multi-sector groups across the state. Through its members and its own advocacy the NYIC has long worked against unjust immigration policies, including the use of detention against immigrants.

Pangea Legal Services

Pangea Legal Services ("Pangea") is a nonprofit organization that advocates for immigrants in deportation proceedings through legal representation, community empowerment, and policy advocacy. The impact of prolonged detention for Pangea's clients is stark: it has resulted in a loss of employment, loss of custody by mothers over their minor children, traumatized children who experience loss of a parent, loss of health, reliving traumas of being held captive in detention after escaping abusive captivity abroad, eviction from the home, and homelessness by immediate relatives of detained immigrants.

Project South

Project South is a Southern-based leadership development organization that creates spaces for movement building. We work with communities pushed forward by the struggle – to strengthen leadership and to provide popular political and economic education for personal and social transformation. We build relationships with organizations and networks across the US and global South to inform our local work and to engage in bottom-up movement building for social and economic justice. Our legal and advocacy work is focused on defending Muslim and immigrant communities against discrimination.

Queens Law Associates – Public Defenders

Queens Law Associates – Public Defenders ("QLA") is a nonprofit legal service provider representing low-income individuals – some of whom are noncitizens – facing criminal charges in the criminal justice system. QLA also provides free legal services to noncitizens in their immigration matters, including representation in deportation proceedings. QLA has a direct interest in this case, as its clients may be subject to mandatory detention provisions based on convictions and may be detained by ICE for prolonged periods.

Seton Hall University School of Law Center for Social Justice

The Seton Hall University School of Law Center for Social Justice empowers law students to gain critical,

hands-on experience while providing pro bono legal services for low-income residents in the region. The Center has long worked to defend the statutory, constitutional, and human rights of immigrants.

Southern Poverty Law Center

The Southern Poverty Law Center ("SPLC") fights all forms of discrimination and works to protect society's most vulnerable members through litigation, education, and monitoring organizations that promote hate. The SPLC provides *pro bono* assistance to and advocates on behalf of immigrant detainees throughout the southern United States, including Alabama, Florida, Georgia, Louisiana, and Mississippi.

University of California, Irvine School of Law Immigrant Rights Clinic

The University of California, Irvine School of Law Immigrant Rights Clinic is a law clinic providing pro bono legal services to immigrants in removal proceedings. The Clinic also partners with community and legal advocacy organizations on policy and litigation projects to advance immigrants' rights and immigrant workers' rights. For several years, clinic students working under the supervision of faculty attorneys have represented immigrants detained at the Adelanto Detention Center and Orange County, CA facilities in their bond hearings.

University of Houston Law Center Immigration Clinic

The University of Houston Law Center Immigration Clinic advocates on behalf of immigrants in a broad range of complex legal proceedings before the immigration and federal courts and the Department of Homeland Security. The Clinic collaborates with other immigrant and human rights groups on projects that advance the cause of social justice for immigrants.

University of Maryland Carey School of Law Immigration Clinic

The University of Maryland Carey School of Law Immigration Clinic represents individuals in immigration removal proceedings, including individuals who are detained without bond. The Clinic represents individuals who are subject to mandatory detention, many of whom end up being detained for prolonged periods of time.

UnLocal, Inc.

UnLocal, Inc. is an immigration legal services and community education non-profit based in New York City. UnLocal provides presentations on immigration law, know your rights trainings, and legal consultations at community-based spaces including schools, workplaces, places of worship and other immigrant-serving organizations. UnLocal clients and the membership of many of UnLocal's community-based partners include

individuals who have faced detention without bond during the pendency of their removal proceedings.

Valparaiso University Law School Immigration Clinic

The Valparaiso Immigration Clinic ("VIC") is a law clinic at Valparaiso University Law School that represents immigrants in Northwest Indiana and Chicago, including individuals who have been held in immigration detention. VIC students have also assisted with case intake for immigrant detainees, provided community outreach in Northwest Indiana concerning immigrant rights issues, and represented immigrant rights organizations that work with immigrant detainees.

Washington and Lee University School of Law Immigrant Rights Clinic

The Washington and Lee University School of Law Immigrant Rights Clinic provides free legal services to non-citizens in removal proceedings in Virginia. Many of our clients are detained in the immigrant detention facility in Farmville, VA, which is the primary detention facility in Virginia, housing between 600-700 non-citizens.

Washington Defender Association

The Washington Defender Association ("WDA") is a statewide non-profit organization whose membership

is comprised of public defender agencies, indigent defenders and those who are committed to seeing improvements in indigent defense. In 1999, WDA established WDA's Immigration Project to give the Washington defense bar access to expert immigration law resources in order to effectively represent their noncitizen clients with regard to the immigration consequences at stake in their criminal cases. Detention issues are a vital part of the immigration consequence of a conviction, and can radically affect access to counsel and case outcomes.

RECORD AND BRIEFS.

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INTERESTS OF AMICI CURIAE[1]

This brief is submitted by all members of Asian Americans Advancing Justice (Advancing Justice), the national affiliation of five nonprofit, nonpartisan civil rights organizations: Asian Americans Advancing Justice – AAJC, Asian Americans Advancing Justice – Asian Law Caucus, Asian Americans Advancing Justice – Atlanta, Asian Americans Advancing Justice – Chicago, and Asian Americans Advancing Justice – Los Angeles. Members of Advancing Justice routinely file *amicus curiae* briefs in cases in this Court and other courts. Through direct services, impact litigation, policy advocacy, leadership development, and capacity building, the Advancing Justice affiliates advocate for marginalized members of the Asian American, Native Hawaiian, Pacific Islander and other underserved communities, including immigrant members of those communities.

Asian Americans and Pacific Islanders (AAPI) have a strong interest in this case in light of their long and troubled experience with our immigration system. Much of modern immigration legal doctrine relies on cases concerning racist laws that were enacted over a century ago specifically to exclude AAPI immigrants. Today, segments of the AAPI community remain disproportionately represented in immigration detention and, in turn, bear a significant share of the physical and emotional harms that flow from it, together with

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel has made a monetary contribution intended to fund the preparation or submission of the brief. All parties have filed with the Clerk a letter of blanket consent to the filing of briefs of amici curiae.

other immigrant communities. The length of immigration detention today, especially when considered with the conditions that detainees typically experience, renders immigration policies effectively punitive for many detainees. And this harm extends to the families and communities from which these detainees are plucked, destabilizing households and causing lasting psychological suffering for children. This experience—of detainees, families, and society as a whole—provides important historical and contemporary context in this case.

SUMMARY OF ARGUMENT

Amici write to place in context the Government's deeply troubling argument that the "plenary power" doctrine justifies minimal constitutional scrutiny of immigration detention. The plenary power doctrine was born as a means to rationalize racist laws excluding AAPIs from this country. It effectuated the Government's widespread reduction of individual immigrants to pernicious stereotypes, particularly as threats to public safety. This sort of generalizing about immigrants—which the Government again employs in this case, echoing the justifications offered for Chinese exclusion and Japanese American internment—is one of the very harms that the individualized custody hearings at issue here are designed to prevent. The Court should pause before extending the plenary power doctrine particularly where, as here, the authority the Government seeks will once again significantly affect AAPI and other immigrant communities who have been demonized in public discourse.

Viewed in context, the plenary power doctrine has no relevance to this case. The doctrine is best under-

stood to do no more than limit constitutional scrutiny over the Government's power to exclude and deport noncitizens. The small handful of decisions that invoke plenary power outside the context of exclusion and deportation do not support the much broader notion that the Government may deprive noncitizens in immigration detention of the baseline liberty protections afforded to all persons by the Due Process Clause. Because the Due Process Clause protects "persons," citizens and noncitizens in civil detention are equally entitled to its liberty protections. The Government asks, in essence, for the Court to ignore that basic truth, and extend the plenary power doctrine because of amorphous and unsubstantiated concerns about public safety. But there is no legal basis to detain the immigrants in this case based on dangerousness. The Government's appeal to public safety in this context is based on the xenophobic—and empirically false—notion that immigrants are inherently more dangerous than citizens. It should be rejected.

To the extent that the plenary power doctrine limits the irreducible liberty protections afforded to persons in immigration detention, it should be relegated to the ash heap of history, alongside other racist doctrines handed down by the Fuller Court. *See, e.g.*, *Plessy v. Ferguson*, 163 U.S. 537 (1896). The doctrine has never outgrown its racist origins. Modern cases simply reiterate the old rationalizations offered for excluding AAPI immigrants, even as those rationalizations have grown steadily more indefensible. If Congress were to enact a law today that excluded all AAPI immigrants in the name of preserving a distorted vision of racial purity, it is hard to imagine this Court would uphold such a law under the plenary power doctrine. The Court should not sanction the

continued use of a doctrine that was first employed to achieve just that result. Eschewing plenary power, moreover, would leave Congress with ample authority to make immigration law. Congress simply would be required, in the immigration context as elsewhere, to exercise its authority consistent with the liberty interests protected by the Due Process Clause.

ARGUMENT

The Government contends that it may deprive immigration detainees of their liberty in ways that would unquestionably violate the Due Process Clause but for the detainees' lack of citizenship. In particular, the Government contends (1) that it has "plenary authority over immigration and the exclusion or expulsion of aliens," Pet. Br. at 53, (2) that this authority justifies subjecting noncitizens to "rules that would be unacceptable if applied to citizens," *id.* (quoting *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976)), and (3) that deprivations of liberty that would violate the Due Process Clause as applied to citizens may permissibly be applied to noncitizens, *id.* at 54 (citing *Fiallo v. Bell*, 430 U.S. 787 (1977)). This argument, which permeates the Government's brief, *see e.g.*, *id.* at 11, 14, 21, 25, 53, rests not on principle but on a legacy of racism. It cannot bear the constitutional weight the Government places upon it.

I. *The Plenary Power Doctrine is Rooted in Racism Against AAPI Immigrants*

The Government invokes several decisions to support its reliance on the plenary power doctrine. *See* Pet. Br. at 19, 20, 27, 53, 54 (citing *Demore v. Kim*, 538 U.S. 510 (2003); *Reno v. Flores*, 507 U.S. 292 (1993); *Fiallo v. Bell*, 430 U.S. 787 (1977); *Mathews v. Diaz*, 426 U.S. 67 (1976); *Shaughnessy v. United*

States ex rel. Mezei, 345 U.S. 206 (1953) ("*Mezei*"); *Carlson v. Landon*, 342 U.S. 524 (1952); and *Knauff v. Shaughnessy*, 338 U.S. 537 (1950) ("*Knauff*")).

These cases are built from an anachronistic foundation of racial animus and xenophobia directed toward AAPI immigrants. For the first hundred or so years of this country's history, the federal government imposed no restrictions on immigration. Ting, *"Other Than a Chinaman": How U.S. Immigration Law Resulted From and Still Reflects a Policy of Excluding and Restricting Asian Immigration*, 4 Temp. Pol. & Civ. Rts. L. Rev. 301, 302 (1995). But when Chinese immigration began to increase, Congress reassessed this policy, propelled by fierce and often violent public reactions to Chinese immigrants. *Id.* Shortly after the Civil War, Congress began passing a series of laws closing the country's borders to Chinese immigrants. The first such law, the Page Law of 1875, prohibited entry of Chinese immigrants deemed "undesirable," namely convicts and prostitutes. Act of March 3, 1875, ch. 141, 18 Stat. 477. A few years later, in the Chinese Exclusion Act of 1882, Congress extended this prohibition to all new immigrants from China. Pub. L. No. 47-126, 22 Stat. 58. Chinese exclusion remained in effect for sixty years, until it was finally repealed during World War II. Pub. L. No. 78-199, 57 Stat. 600 (1943).

The legislative history of the Chinese Exclusion Act made its racism plain. For instance, Senator Henry M. Teller of Colorado defended the law as follows: "The Caucasian race has a right, considering its superiority of intellectual force and mental vigor, to look down upon every other branch of the human family . . . . We are the superior race today. We are superior to the Chinese." 13 Cong. Rec. 1645, 1645

(1882). Likewise, Senator John Franklin Miller of California warned that "[t]he presence of an inferior race either inevitably expels the superior race or reduces it to the ways, modes of life, and all the other conditions of the new-comers." *Id.* at 1744; *see also id.* at 1978 (statement of Rep. Cassidy) ("We religiously believe that unrestricted Mongolian immigration means ultimate destruction."); *id.* at 2031 (statement of Rep. Brumm) ("The Chinaman is neither socially, morally, nor politically fit to assimilate with us."). There is no historical dispute that Chinese exclusion was the product of a virulent mix of "nativism, racism, and xenophobia." Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 Harv. L. Rev. 853, 855 (1987). Much of this anti-Chinese animosity was "rooted in fear of both the competition Chinese men posed to white labor, and of the regenerative and polluting power of Chinese women." Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 Colum. L. Rev. 641, 664 (2005).

Congress extended the scope of Chinese exclusion still further in 1888 in the Scott Act. Under the Act, Chinese exclusion applied to virtually "all persons of the Chinese race," including such persons who had once legally resided in the United States. Act of October 1, 1888, ch. 1064, 25 Stat. 504. The Act did not require deportation of Chinese immigrants present in the country, but provided that such immigrants who traveled outside the country would not be permitted to return. *Id.*[2]

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[2] The Scott Act made exceptions for Chinese government officials, teachers, students, tourists, and merchants.

The plenary power doctrine emerged as an affirmation and rationalization of these racist laws. The doctrine is typically traced to *Chae Chan Ping v. United States*, often cited simply as the *Chinese Exclusion Case*, which upheld the constitutionality of the Chinese Exclusion Act of 1882. 130 U.S. 581 (1889). The petitioner in *Chae Chan Ping*, a Chinese immigrant who had obtained a certificate of identity proving his legal residence in the United States, traveled to China in 1887 and, upon his return to the United States, was refused reentry under the Scott Act of 1888. The Court rejected the petitioner's argument that his exclusion was unconstitutional, reasoning that it was "not . . . open to controversy" that the federal government could "exclude aliens from its territory." *Id.* at 603. The Court explained that "[j]urisdiction over its own territory to that extent is an incident of every independent nation," and that if the federal government could not exclude noncitizens, "it would be to that extent subject to the control of another power." *Id.* *Chae Chan Ping* thus effectively afforded Congress *carte blanche* to exclude noncitizens, including on grounds of racism.

Chae Chan Ping's progeny further cleared the constitutional path for racist immigration laws concerning admission and deportation of noncitizens. In *Nishimura Ekiu v. United States*, the Court held that immigrants denied admission could not challenge their exclusion on due process grounds, reasoning that "the decisions of the executive officers, acting within powers expressly conferred by congress, are due process of law." 142 U.S. 651, 659 (1892). The following year, in *Fong Yue Ting v. United States*, the Court extended this seemingly unbridled power over exclusion of noncitizens to laws regarding deportation. 149 U.S. 698 (1893). It held: "The right of a

nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country . . . is as absolute and unqualified as the right to prevent their entrance into the country." *Id.* at 707; *but see Kaoru Yamataya v. Fisher*, 189 U.S. 86, 100-101 (1903) (limiting *Fong Yue Ting* by holding that Congress nevertheless could not "disregard the fundamental principles that inhere in 'due process of law'" in deportation).

These decisions gave the Court's imprimatur to a steady stream of racist and exclusionary immigration laws and policies directed toward AAPIs. The Chinese Exclusion Act of 1882, initially effective for only a ten-year period, was renewed in 1892 and made permanent in 1902. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. Rev. 1, 37 (1998). Against this backdrop, immigration law and policies continued to evolve primarily to exclude immigrants from other Asian countries. For instance, when immigrants from Japan began to arrive in the United States in significant numbers, the two countries entered the Gentleman's Agreement of 1907-1908, which provided that Japan would not issue documents for travel to the United States. *See id.* at 13. In 1917, as immigration from India and Southeast Asia began to grow, Congress extended immigration exclusions to all races indigenous to the "Asiatic Barred Zone," which it defined to include nearly all of Central and Southeast Asia. Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 874, 876; *see also* Senate Judiciary Comm., The Immigration and Naturalization Systems of the United States, S. Rep. No. 81-1515, at 67

(1950).[3] Notably, Congress excepted from this exclusion all "white persons born in the zone." *Id.*

These exclusionary laws were consolidated in the Immigration Act of 1924. Under the Act, "aliens ineligible to citizenship" were denied admission to the country. Immigration Act of 1924, ch. 190, 43 Stat. 153, 168. "This phrase was a euphemism for [AAPIs] because the act defined an alien 'ineligible to citizenship' as one covered by the Chinese Exclusion Act or racially ineligible to naturalize." Chin, *supra*, at 13-14. Following the law, nearly all AAPIs were barred from immigrating to the United States, and even AAPI immigrants lawfully present in the United States were barred from becoming U.S. citizens. *Id.* at 14. These exclusions were explicitly racial in nature: even if a person of Chinese descent sought to immigrate to the United States from a country subject to no comparable exclusion, the racial exclusion would apply to that person. *Id.*

The racism against AAPIs reflected and reinforced by these exclusion and deportation laws permeated into the detention context as well, in what is widely accepted as a stain on our constitutional jurisprudence. During World War II, the federal government forcibly interned Japanese Americans following the attack on Pearl Harbor. The chief architects of internment did not conceal their racism. General John DeWitt, the Commander of the Western Defense, made the case for internment to Secretary of War

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[3] The zone "include[d] the East Indies, western China, French Indochina, Siam, Burma, India, Bhutan, Nepal, eastern Afghanistan, Turkestan, the Kirghiz Steppe, and the southeastern portion of the Arabian Peninsula." S. Rep. No. 81-1515, at 67.

Henry Stimson in transparently racial terms: "In the war in which we are now engaged, racial affinities are not severed by migration. The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil have become 'Americanized,' the racial strains are undiluted." Commission on Wartime Relocation and Internment of Civilians, Personal Justice Denied 6 (1997). Stimson assessed internment through the same racial lens; shortly before President Roosevelt authorized internment, Stimson wrote in his diary that "the racial characteristics [of U.S.-born Japanese Americans] are such that we cannot understand or trust even the citizen Japanese." Daniels, *The Japanese American Incarceration Revisited: 1941-2010*, 18 Asian Am. L.J. 133, 134 (2011).

General DeWitt made the same racist case for Japanese American internment before Congress, distinguishing it from treatment of European immigrants from other enemy nations. He explained that "[t]he danger of the Japanese was, and is now,—if they are permitted to come back—espionage and sabotage. It makes no difference whether he is an American citizen, he is still a Japanese. American citizenship does not necessarily determine loyalty." Personal Justice Denied, *supra*, at 66. Asked why persons of Japanese heritage should be treated differently from those of Italian and German heritage, General DeWitt replied: "You needn't worry about the Italians at all except in certain cases. Also, the same for the Germans except in individual cases. But we must worry about the Japanese all the time until he is wiped off the map." *Id.* In line with General DeWitt's thinking, "[t]here were no serious proposals for the mass movement of categories of American citizens of German and Italian descent." *Id.* at 286.

As early as 1948, Congress conceded that "there was recorded during [World War II] not one act of sabotage or espionage attributable to those who were the victims of the forced relocation." *Id.* at 50. This widespread reduction of individuals to erroneous mass generalization is not merely a stain of history; it is one of the very harms that the individualized custody hearings at issue here are designed to prevent.

Only after the United States allied with China during World War II did Congress begin to repeal its exclusions of AAPI immigrants. Ting, *supra*, at 305. Even then, direct discrimination against AAPIs persisted in federal immigration policy into the 1960s. Although immigration from China was allowed, for instance, the strictest possible quota applied: only 100 persons were admitted each year. *Id.* This quota, like the Immigration Act of 1924, operated based on race, not national origin: only 100 persons of Chinese descent were allowed in the country each year, whether or not they were born in China. *Id.* Similar quotas applied to other AAPI immigrants. *Id.* When these quotas were abolished in 1965, it was only amidst assurances that immigration patterns were not expected to change significantly. *Id.* at 307.

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Unfortunately, the letter of the law remains stained by this legacy even today. One branch of this legacy is, of course, this Court's response to Japanese American internment in *Korematsu v. United States*, 323 U.S. 214 (1944). *Korematsu* is a decision that, while not formally overruled, has been rejected "in the court of history," *see* Tribe, American Constitutional Law 237 n.118 (3d ed. 2000). But whereas *Korematsu* has become something of a cautionary tale, *e.g.* Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 422

(2011) (identifying the "anticanon" of constitutional law as including *Dred Scott v. Sandford*, *Plessy v. Ferguson*, *Lochner v. New York*, and *Korematsu*), the plenary power doctrine—born of the same racist animus—remains very much alive, including as support cited by the Government here. This legacy should counsel for serious pause before extending the doctrine further, particularly in this case where the authority the Government seeks will once again disproportionately affect AAPI and other immigrant communities who have been demonized in public discourse.

II. *The Plenary Power Doctrine Should Not Be Extended Beyond Exclusion and Deportation to Civil Detention of Noncitizens*

The Government's argument for extending the plenary power doctrine to this case relies heavily on language enunciated in *Mathews* and now running through several of the Court's decisions, including *Demore*: "In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." Pet. Br. at 53; *Mathews*, 426 U.S. at 79-80; *see also Demore*, 538 U.S. at 521 (quoting *Mathews*). This statement is, of course, a truism: Virtually all of immigration law involves the exercise of powers that Congress could not employ as to citizens. But the Government invokes these words to suggest something more—that Congress may operate largely free from constitutional constraint in the immigration arena. This suggestion would extend plenary power beyond its doctrinal moorings and should be rejected.

Since its inception, the plenary power doctrine has concerned the power to exclude and deport nonciti-

zens. This power, broad as it may be, is critically a power over the flow of immigration, not over the physical liberty of immigrants held in custody. It thus has no bearing at all on what is at issue in this case: civil detention. This is not to say that the Government may not detain noncitizens in order to implement the immigration laws, just as it may detain citizens in other civil detention contexts. Rather, as "persons," noncitizens in civil detention are entitled to the same due process protections as citizens in analogous contexts, including individualized custody hearings.

This is apparent from a brief review of the doctrinal history. In the decades following *Chae Chan Ping*, *Nishimura Ekiu*, and *Fong Yue Ting*, the Court steadily invoked those decisions for the proposition that the federal government has plenary power over exclusion and expulsion of noncitizens. *E.g. United States ex rel. Turner v. Williams*, 194 U.S. 279, 289-90 (1904) (exclusion and expulsion); *United States v. Ju Toy*, 198 U.S. 253, 263 (1905) (exclusion); *Ng Fung Ho v. White*, 259 U.S. 276, 280 (1922) (expulsion); *Mahler v. Eby*, 264 U.S. 32, 40 (1924) (expulsion). The Court also approved "detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion," so long as such detention or confinement was nonpunitive. *Wong Wing v. United States*, 163 U.S. 228, 235 (1896). But nowhere did these decisions hold that the Government has plenary authority to minimize the constitutional liberty interest to be free from detention that applies to all persons under the Due Process Clause. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (holding the Due Process Clause applicable to "all persons," including noncitizens).

In *Zadvydas v. Davis*, citing *Wong Wing*, this Court recognized that noncitizens have important liberty interests in avoiding immigration-related detention. 533 U.S. 678, 694 (2001). There, as here, the Government had argued that, in the context of civil detention of noncitizens, courts "must defer to Executive and Legislative Branch decisionmaking" pursuant to "cases holding that Congress has 'plenary power' to create immigration law." *Id.* at 695. The Court rejected this view, explaining that the plenary power doctrine is "subject to important constitutional limitations," *id.*, including the Due Process Clause, which "applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent," *id.* at 683; *see also id.* at 695 (noting that *Zadvydas* did not "require [the Court] to consider the political branches' authority to control entry into the United States," as opposed to their authority to infringe on physical liberty).

In *Demore*, the Court recognized this principle, noting that "[i]t is well established that the Fifth Amendment entitles [noncitizens] to due process of law in deportation proceedings." 538 U.S. at 523. But *Demore* nonetheless relied on the plenary power doctrine in concluding that noncitizens subject to civil detention are entitled to lesser due process protections than citizens. It cited a series of plenary power decisions invoked by the Government in this case, including *Mathews*, *Flores*, and *Carlson*. *Id.* at 521-26.

None of these three decisions should be read to establish that plenary power is relevant to civil detention. *Mathews* does not support the view that Congress's power to distinguish between citizens and noncitizens has any bearing on the dictates of due process in civil detention. The plaintiffs in *Mathews*

claimed that all noncitizens—rather than only noncitizens who had resided in the country for more than five years—should be afforded Medicare benefits equal to those received by citizens. 426 U.S. at 69. The Court rejected this claim, holding that "the fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for all aliens." *Id.* at 80. It reasoned that the federal government's decision to confer such "munificence," could properly consider the length and character of the relationship between a noncitizen and the country. *Id.* The distinction between citizens and noncitizens drawn in *Mathews* likely could have been upheld under the standard of review applicable in federal equal protection cases from other contexts. In any event, *Mathews* did not hold that Congress could reduce the baseline due process rights afforded to all persons when physical liberty is at issue.

Flores also does not support a contrary view. *Flores* did not involve a mandatory detention scheme; it addressed the unique circumstances that arise with detention of *juveniles*. 507 U.S. at 302-05. It held that "freedom from physical restraint" was "not at issue" in the case because children are always in some form of physical custody. *Id.* at 302. *Flores* went on to say that the plenary power doctrine provided an alternative ground to uphold the statute at issue in the case insofar as the statute applied to noncitizens. *Id.* at 305-06. In so stating, *Flores* quoted *Mathews* for the proposition that "Congress regularly makes rules that would be unacceptable if applied to citizens." *Id.* (quoting *Mathews*, 426 U.S. at 79-80); *see also Demore*, 538 U.S. at 522 (quoting this language from *Flores*, in addition to quoting it from *Mathews*). To the extent that this alternative holding in *Flores* meant to suggest that *Mathews* allowed Congress to

ignore the due process requirements afforded all persons with respect to physical liberty, it was clearly mistaken: *Mathews* held no such thing. That Congress has even broad power to exclude and deport noncitizens or, as *Mathews* held, provide them varying levels of immigration benefits, does not mean it can detain them without providing the due process rights afforded all persons.

Nor should this Court rely on *Carlson* to hold that the plenary power doctrine alters the irreducible protections of the Due Process Clause in the civil detention context. In *Carlson*, four noncitizen communists brought habeas petitions challenging, among other things, the Attorney General's authority to confine them without bail during the pendency of deportation proceedings. The Court invoked a long line of plenary power decisions for the proposition that "[t]he power to expel [noncitizens]" was "essentially a power of the political branches," albeit one subject to "judicial intervention under the 'paramount law of the constitution.'" 342 U.S. at 537 (citing *Fong Yue Ting*, *Nishimura Ekiu*, and *Kaoru Yamataya*). The Court then held, however, that there is no denial of due process "where there is reasonable apprehension of hurt from [noncitizens] charged with a philosophy of violence against this Government." *Id.* at 542. The Court's finding of a "reasonable apprehension of hurt" based upon demonstration of a "philosophy of violence" in *Carlson* distinguishes it from this case, where the Government does not and cannot justify such an assumption as to the varied types of immigrants who are detained here. More importantly, *Carlson* gave no justification for this aspect of its holding. The only authority *Carlson* cited was *Knauff*, an exclusion case that did not address the due process rights afforded to persons in civil detention. *Id.*

Finally, the Government's reliance on *Mezei* is similarly misplaced. *Mezei* is primarily an exclusion case: relying on the plenary power doctrine, the Court upheld the Government's authority to exclude a noncitizen harbored on Ellis Island. 345 U.S. at 212; *see also id.* at 213 (describing the case as "an exclusion proceeding"). As the Government emphasizes, *Mezei* also suggested that noncitizens denied admission have no due process rights aside from those granted by Congress. *See* Pet. Br. at 19. Whatever the merits of this suggestion as to the facts in *Mezei*—which involved the "continued exclusion," 345 U.S. at 215, of someone who had lost the right to live in the United States and could not be repatriated because no other country would take him—it should not be read to support the general proposition that noncitizens as a general matter have lesser liberty interests in "freedom from imprisonment." *Zadvydas*, 533 U.S. at 690.

Because the Due Process Clause protects "persons," citizens and noncitizens in civil detention are equally entitled to its liberty protections. The Government asks, in essence, for the Court to ignore that basic truth, and extend the plenary power doctrine to civil detention because of concerns about public safety. But there is no legal basis to detain the immigrants in this case based on dangerousness. Many of them have no criminal history, and those that do have served their sentences. The appeal to public safety in this context is based on the xenophobic—and empirically false—notion that immigrants are inherently more dangerous than citizens. *See, e.g.*, Jason L. Riley, *The Mythical Connection Between Immigrants and Crime*, Wall St. J. (July 14, 2015), http://www.wsj.com/articles/the-mythical-connection-between-immigrants-and-crime-1436916798 (collecting sources). Indeed, the Government's appeal to

public safety is comprised of the same hollow justifications used to rationalize incarcerating immigrants in the past. It should be rejected.

III. *Built on Racism and Exclusion, the Plenary Power Doctrine Should be Discarded*

Even if the plenary power doctrine did apply to immigration detention, the Court should not rely on it because the doctrine belongs in the ash heap of history alongside other racist doctrines handed down by the Fuller Court. *See, e.g.*, *Plessy v. Ferguson*, 163 U.S. at 552 (upholding "separate but equal" accommodations); *Ex parte Lockwood*, 154 U.S. 116 (1894) (upholding exclusion of female lawyers from the Virginia bar); *Davis v. Beason*, 133 U.S. 333 (1890) (upholding conviction of Mormon for attempting to vote). The doctrine has never outgrown its racist origins.

Scholars have singled out the plenary power doctrine "for the sharpest criticism," Henkin, *supra*, at 858, and have "argued forcefully for years that [the doctrine] should be reexamined or abolished," Chin, *supra*, at 7-8. In short, the doctrine "has no foundation in principle. It is a constitutional fossil, a remnant of a prerights jurisprudence that we have proudly rejected in other respects." Henkin, *supra*, at 862.

A close look at the cases invoked by the Government illustrates the fossilized nature of the doctrine. As described above, the Court's initial decisions on plenary power invoked conclusory notions of national sovereignty to justify racism against AAPIs. In the years since, the Court's invocations of plenary power have simply reiterated the flawed and unprincipled claims of those initial cases, even as their flaws have grown more and more apparent.

The normalization of the racist underpinnings of the plenary power doctrine is particularly clear in a series of decisions following World War II. For instance, in 1950, the Court upheld the exclusion of a noncitizen based on a determination by the Attorney General that "her admission would be prejudicial to the interests of the United States." *Knauff*, 338 U.S. at 539-40. Citing *Nishimura Ekiu* and *Fong Yue Ting*, the Court observed: "Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *Id.* at 543. It added, again citing *Nishimura Ekiu*: "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Id.* at 544.

In decisions over the next several years, the Court repeatedly affirmed the plenary power doctrine based purely on the legacy of its decisions upholding Chinese exclusion. In *Carlson*, the Court stated that the plenary power doctrine was "not questioned and require[d] no reexamination," citing *Nishimura Ekiu* and *Fong Yue Ting*. 342 U.S. at 534. Likewise, *Mezei* grounded the plenary power doctrine in *Chae Chan Ping* and *Fong Yue Ting* as well as the Court's decision in *Knauff* from a few years previously. 345 U.S. at 210. The following Term, the Court acknowledged the dangers of leaving the plenary doctrine unexamined, noting that "[i]n light of the expansion of the concept of substantive due process as a limitation upon all powers of congress, even the war power, . . . much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as

belonging to Congress in regulating the entry and deportation of [noncitizens]." *Galvan v. Press*, 347 U.S. 522, 530-31 (1954) (citation omitted). But the Court concluded that "the slate is not clean," observing that "there is not merely 'a page of history,' but a whole volume." *Id.* at 531 (citation omitted). That this volume of history is a volume inscribed with racism and exclusion received no comment, but was implicit.

Chinese exclusion also remains close beneath the surface—if not on the surface—of the Court's more recent affirmations of the plenary power doctrine. For instance, the Government invokes *Fiallo v. Bell* for the proposition that the Court "'ha[s] long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" 430 U.S. at 792 (quoting *Mezei*, 345 U.S. at 210); Pet. Br. at 19. In support of this proposition, *Fiallo* cited *Fong Yue Ting* and *Chae Chan Ping*. The Court's distinction between citizens and noncitizens in *Mathews*, see Pet. Br. at 53, likewise was built on an artifice of Chinese exclusion cases. *Mathews* cited *Galvan* and a pair of other decisions: *Kleindienst v. Mandel*, 408 U.S. 753 (1972), and *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952). *Kleindienst* and *Harisiades*, in turn, rested their assertions of plenary power on *Chae Chan Ping* and *Fong Yue Ting*. *See Kleindienst*, 408 U.S. at 765 (citing *Chae Chan Ping* and *Fong Yue Ting*); *Harisiades*, 341 U.S. at 586 (citing *Fong Yue Ting*). The plenary power discussions in *Flores* and *Demore* invoked the same artifice of decisions built on *Chae Chan Ping*, *Nishimura Ekiu*, and *Fong Yue Ting*. *See Flores*, 507 U.S. at 305-06 (citing *Mathews*, *Fiallo*, and *Carlson*); *Demore*, 538 U.S. at 521-22 (citing *Flores*, *Mathews*, *Fiallo*, *Carlson*, and *Harisiades*).

The failure to take stock of the origins of the plenary power doctrine has grown only more glaring with time. When *Chae Chan Ping*, *Nishimura Ekiu*, and *Fong Yue Ting* were decided, "the Bill of Rights had not yet become our national hallmark and the principal justification and preoccupation of judicial review. It was an era before United States commitment to international human rights; before enlightenment in and out of the United States brought an end both to official racial discrimination at home and to national-origins immigration laws." Henkin, *supra,* at 862-63. If Congress were to pass a law excluding all AAPI immigrants today in the name of preserving a distorted vision of racial purity, it is hard to imagine that this Court would uphold such a law as within the federal government's plenary power. Yet the Court persists in accepting the doctrine that was crafted to achieve that indefensible result.

Discarding the plenary power doctrine would not require discarding the truism that Congress may make laws applying to noncitizens—like exclusion and deportation laws—that Congress could not apply to citizens. It would simply require that immigration laws, like all laws of this country, be subject to otherwise-applicable constitutional constraints, including appropriate judicial review to ensure compliance with the Constitution's demands. Here, the relevant constitutional constraints are those imposed by the Due Process Clause regarding deprivations of physical liberty. The Court should not ignore, in the context of immigration detention, the due process protections that are and should be applicable to all persons. There is no defensible justification for such a rule.

CONCLUSION

For the above reasons, the Court should analyze the immigration detention scheme at issue here in accordance with the due process requirements that attach to all other forms of civil detention, and not under the plenary power doctrine, which is both irrelevant and illegitimate. The detentions at issue here that deprive immigrants of individualized custody review are plainly unlawful as measured against those due process standards. Accordingly, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DAVID JENNINGS, *et al.*,

Petitioners,

v.

ALEJANDRO RODRIGUEZ, *et al.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF CALIFORNIA, MASSACHUSETTS, NEW YORK, OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

This Court has specified the following questions:

1. Whether the Constitution requires that aliens seeking admission to the United States who are subject to mandatory detention under 8 U.S.C. § 1225(b) must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months.

2. Whether the Constitution requires that criminal or terrorist aliens who are subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months.

3. Whether the Constitution requires that, in bond hearings for aliens detained for six months under Sections 1225(b), 1226(c), or 1226(a), the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community, whether the length of the alien's detention must be weighed in favor of release, and whether new bond hearings must be afforded automatically every six months.

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INTERESTS OF AMICI

The States of California, Massachusetts, New York, Oregon, Rhode Island, Vermont, and Washington submit this brief in support of the principle that if the federal government wishes to detain an individual for an extended period during the course of legal removal proceedings, it must justify that decision to a neutral arbiter, on individualized grounds and subject to appropriate periodic review. To the extent that the federal statutes at issue here require or authorize the federal Executive to detain and confine individuals for prolonged periods without providing these basic safeguards, they fail to comport with the Constitution's fundamental command that "[n]o person shall ... be deprived of ... liberty ... without due process of law." U.S. Const. amend. V.

The amici States have a strong interest in ensuring that non-citizens who seek to establish a legal right to remain in the United States and who pose no demonstrable danger to society or risk of flight are not unnecessarily subject to prolonged detention while that issue is resolved. California alone is home to nearly 25% of the United States' foreign-born population, including 25% of all legal permanent residents and 21% of undocumented immigrants.[1] The

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[1] Anna Brown & Renee Stepler, Pew Research Ctr., *Statistical Portrait of the Foreign-Born Population in the United States* (Apr. 19, 2016), http://www.pewhispanic.org/2016/04/19/statistical-portrait-of-the-foreign-born-population-in-the-united-states/; Bryan Baker & Nancy Rytina, Dept. of Homeland Security, Office of Immigration Statistics, *Estimates of the Lawful Permanent Resident Population in the United States: January 2013* at 4 (Sep. 2014), https://www.dhs.gov/sites/default/files/publications/LPR%20Population%20Estimates%20January%202013.pdf; Pew Research Ctr., *Unauthorized immigrant popu-*

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amici States combined account for nearly 17.5 million immigrants, or more than 41% of the Nation's total immigrant population.

As has been true throughout our Nation's history, the vast majority of these individuals pose no threat. On the contrary, they are integral members of our communities who contribute to our economies and civil societies. Of course, the amici States support the lawful detention of demonstrably dangerous individuals. But many of those facing removal pose no such concern. And federal statutes or policies that proceed on unjustifiably broad categorical grounds, resulting in needless detentions, cause real harm—not only to the individuals detained but to their families, their employers or employees, their co-workers, their communities, and their States.

SUMMARY OF ARGUMENT

The federal statutes at issue in this case result in the prolonged detention of thousands of individuals every year. While some of these individuals are dangerous or pose a genuine risk of flight, many pose no threat and are firmly-rooted, contributing members of our society. Many have been here since childhood, and many have spouses, children, or other close relatives who are U.S. citizens or permanent residents. They work or run businesses, support families, and pay state and federal taxes. Many have no criminal record, and many others have been convicted of only minor, non-violent offenses. All are seeking to establish, through legal proceedings, that they may not or

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lation trends for states, birth countries and regions (Nov. 3, 2016), http://www.pewhispanic.org/interactives/unauthorized-trends/.

should not be forced to leave the United States. Detaining individuals such as these for extended periods while those proceedings remain pending can be devastating for the detainees, their families, and their communities.

Sometimes it is necessary to impose these costs. As this Court has made clear, however, "[i]n our society liberty is the norm." *United States v. Salerno*, 481 U.S. 739, 755 (1987). In other contexts involving civil detention, very familiar to the States, this Court has repeatedly held that government authorities may not deprive an individual of his or her liberty for any extended period without first convincing a neutral arbiter that there is an adequate justification for the detention, and then providing additional procedural protections such as periodic review. These are routine and essential requirements of due process—designed to protect both individuals and our society from the arbitrary or abusive use of executive power. And they apply even in circumstances where the case for detention can be quite strong. Similar safeguards are surely appropriate here.

What due process requires can vary considerably depending on particular circumstances. Here, the basic measures sought by respondents would strike an appropriate balance between the interests of individuals and those of the federal government. Requiring that executive authorities bear the burden of justifying any prolonged detention to a neutral decision-maker, based on each detainee's individual circumstances, is a typical minimum of due process. Requiring the government to introduce evidence justifying prolonged detention, taking due account of the length of a proposed or actual detention, and providing a mechanism for periodic review of continued de-

tention would all comport with the burdens that this Court has typically imposed on state and federal authorities in the context of other civil detentions. And respondents have made clear that they do not oppose the appropriate use of other mechanisms, such as supervised release or financial bonds, to reduce the risk that some individuals might abscond or commit a crime before the resolution of removal proceedings.

However the precise balance may be struck in particular situations, the amici States urge this Court to make clear that non-citizen members of our communities, lawfully contesting efforts by the federal government to force their removal from this country, are entitled to the same sort of fundamental procedural protections that are afforded to individuals threatened with civil detention by federal or state authorities in other contexts. Anything less creates too great a risk that federal authorities will, in the name of upholding the Nation's immigration laws, themselves violate one of "freedom's first principles"—the "freedom from arbitrary and unlawful restraint." *Boumediene v. Bush*, 553 U.S. 723, 797 (2008).

ARGUMENT

DUE PROCESS REQUIRES SUBSTANTIAL PROCEDURAL PROTECTIONS WHEN THE FEDERAL GOVERNMENT SEEKS TO DETAIN INDIVIDUALS DURING REMOVAL PROCEEDINGS

"In our society, liberty is the norm," with "carefully limited exception[s]." *Salerno*, 481 U.S. at 755. "Freedom from bodily restraint has always been at

the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Among "freedom's first principles," the "freedom from arbitrary and unlawful restraint" is "[c]hief." *Boumediene*, 553 U.S. at 797. Indeed, "the practice of arbitrary imprisonments, [has] been, in all ages," among "the favorite and most formidable instruments of tyranny." The Federalist No. 84 (Alexander Hamilton). And that threat is at its apex when the detention at issue concerns politically unpopular or marginalized groups. *See, e.g., Boumediene*, 553 U.S. at 732.

In light of these concerns, this Court has held that the Due Process Clause requires certain protections in various contexts in which government authorities seek to detain and confine individuals other than as punishment for a duly proven crime. *See, e.g., Salerno*, 481 U.S. at 748-749. In doing so it has always carefully balanced individual and governmental interests. *E.g., id.* at 748-751. Here, the individual (and state) interests in avoiding unnecessary detention are very strong. The countervailing governmental interests supporting detention *in some cases* are likewise strong. In other contexts, familiar to the States, this Court has reconciled these interests by permitting extended "regulatory" detentions, *id.* at 746—but only where the detaining authority can make a sufficient affirmative showing that the deprivation of liberty is clearly justified in each particular case. That approach strikes an appropriate balance between individual and governmental interests, and the Court should apply it here.

A. Unnecessary Detentions During Removal Proceedings Impose Substantial Individual And Public Harms

The statutes at issue in this case result in the prolonged detention of thousands of individuals every year. In many of these cases, there is no good basis for concluding that the individual involved is likely either to abscond or to create any danger to the community while removal proceedings remain pending. As the court of appeals concluded, most members of the respondent class have "strong ties to this country: Many immigrated to the United States as children, obtained legal permanent resident status, and lived in this country for as long as twenty years before [federal authorities] initiated removal proceedings." Pet. App. 20a.

These individuals are frequently valuable members of our local, state, and national communities. They are employees and employers, family members and heads of household, caregivers, congregants, students, and active participants in a wide range of social organizations. Many are married to citizens or lawful permanent residents, have children born in this country, and hold steady jobs that provide for themselves and their families. Pet. App. 20a. A substantial portion of the class has no criminal history; and of those who have been convicted of any crime, more than half served a sentence of less than six months. Resp. Supp. Br. 6; *see also* Pet. App. 20a ("To the extent class members have any criminal record ... it is often limited to minor controlled substances offenses."). Moreover, most individuals in removal proceedings are seeking, in those proceedings, to demonstrate or secure a legal entitlement to remain in the United States. And a significant num-

ber are successful in that effort. *See* Pet. App. 19a (71% of respondent class members sought relief from removal, and one-third of those who did were successful); *see also* Resp. Supp. Br. 4-6 (nearly two-thirds of Arriving Subclass members and two-fifths of Mandatory Subclass members received favorable decisions in removal proceedings).

Similarly, individuals facing removal proceedings frequently play an important role in our economies. Undocumented immigrants, for example, account for approximately $181 billion of California's gross domestic product each year.[2] Non-citizens also make up a substantial portion of the workforce in our States in key job sectors such as agriculture, information technology, and high-tech manufacturing.[3] And they tend to complement, rather than compete with, non-immigrant employees, filling jobs that other workers often decline to take.[4] Moreover, immigrants contribute substantially to state and local coffers by paying property, sales, and income taxes.[5]

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[2] California Immigrant Policy Ctr., *Resilience in an Age of Inequality: Immigrant Contributions to California* at 3 (Jan. 23, 2017), http://www.caimmigrant.org/research-and-analysis/contributions-html/.

[3] Audrey Singer, Brookings Inst., *Immigrant Workers in the U.S. Labor Force* (Mar. 15, 2012), https://www.brookings.edu/research/immigrant-workers-in-the-u-s-labor-force/.

[4] *ICE Worksite Enforcement – Up to the Job?: Hearing Before the Subcomm. on Immigration Policy and Enforcement of the H. Comm. on the Judiciary*, 112th Cong. 101-112 (2011) (testimony of Cato Institute scholar Daniel Griswold); *cf.* Patricia Cortes, *The Effect of Low-Skilled Immigration on U.S. Prices: Evidence from CPI Data*, 116 J. Pol. Econ. 381, 414 (June 2008).

[5] Lisa Christensen Gee, et al., The Inst. on Taxation & Econ. Policy, *Undocumented Immigrants' State & Local Tax*

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Indeed, undocumented immigrants alone account for approximately $11.64 billion in state and local taxes each year nationwide.[6]

Far from seeking to promote or assist in their removal, many States have taken a range of actions to foster the integration of immigrants into local communities and to safeguard their legal rights. California's public universities, for example, charge in-state tuition and provide financial aid to non-citizen students with significant ties to the State, regardless of their current status under federal immigration law. Cal. Educ. Code §§ 66021.6, 68130.5, 68130.7, 70030-70039. California adopted these measures because they benefit both the student and the State: by making college affordable, these fair tuition policies "increase[] the [S]tate's collective productivity and economic growth." 2001 Cal. Stats. ch. 814, § 1(a)(3). Washington's public universities likewise permit undocumented students with substantial connections to the State to pay in-state tuition. Wash. Rev. Code § 28B.15.012(2)(e); *see also* N.Y. Educ. Law § 355(2)(h)(8) (extending in-state tuition to certain undocumented students). California also allows individuals who are not lawfully present in this country to obtain driver's licenses, based on the Legislature's finding that this measure improves road safety. 2013 Cal. Stats. ch. 524, § 1; *see also* Cal. Veh. Code § 12801.9. In addition, California has provided funds to pay for legal services for unaccompanied minors in federal removal proceedings, in an

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Contributions at 2 (February 2016), http://www.itep.org/pdf/immigration2016.pdf.

[6] *Id.* at 1.

effort to ensure that the legal process they receive is fair. Cal. Welf. & Inst. Code § 13300. And New York's labor protections extend to undocumented workers. *See Balbuena v. IDR Realty LLC*, 6 N.Y.3d 338, 362 (2006).[7]

Because so many non-citizens create value—not danger—in our communities, prolonged detention in connection with federal removal proceedings will often burden both individuals and States in ways that are unjustified and substantial. From a public perspective, removing individuals from productive work or social engagement is doubly costly: Detention is not only expensive, but forces idleness. It can cause detainees to lose their jobs or their homes—consequences that are especially harsh for those who return to their communities after obtaining a favorable result in removal proceedings. It also puts a double strain on social resources, reducing state and federal tax receipts while increasing the demand for public support for those financially dependent on detainees.

Most significantly, prolonged detention imposes great human costs. Roughly one in five undocumented immigrants is married to a U.S. citizen or legal permanent resident.[8] And nearly half of all undocu-

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[7] *See also* Cal. Bus. & Prof. Code § 135.5 (state licensing boards may not deny professional licenses on account of citizenship or immigration status, based on Legislature's finding that it is in the State's "best interests" to provide licenses to such persons); Cal. Welf. & Inst. Code § 14007.8 (extending California's Medicaid program to undocumented minors).

[8] Ctr. for Am. Progress, *Facts on Immigration Today* (Oct. 23, 2014), https://www.americanprogress.org/issues/immigration/report/2014/10/23/59040/the-facts-on-immigration-today-3/.

mented immigrants are parents to minor children who live in this country.[9] Approximately 5.5 million children, including 4.5 million U.S. citizens, have at least one parent who is an undocumented immigrant.[10] Similarly, many of the 13.1 million legal permanent residents who live in the United States have family ties to this country.[11] Detention of any non-citizen for prolonged (or even simply uncertain) periods can throw the individual's family into economic disarray: without the detainee's income, the family may be unable to afford groceries or forced into homelessness.[12] Detention of a parent can have particularly harsh consequences for children: some struggle in school, and others may be forced into foster care.[13] The latter result can prove especially costly to the States, which spend approximately $26,000

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[9] *Id.*

[10] Pew Research Ctr., *Unauthorized Immigrant Population: National and State Trends, 2010* at 13 (Feb. 1, 2011), http://www.pewhispanic.org/files/reports/133.pdf.

[11] Jie Zong & Jeanne Batalova, Migration Policy Inst., *Green-Card Holders and Legal Immigration to the United States* (Oct. 1, 2015), http://www.migrationpolicy.org/article/green-card-holders-and-legal-immigration-united-states (66% of immigrants who obtained legal permanent resident status in 2013 did so on the basis of a family relationship).

[12] Ajay Chaudry, et al., The Urban Inst., *Facing Our Future: Children in the Aftermath of Immigration Enforcement* at 29-33 (Feb. 2010), http://www.urban.org/sites/default/files/publication/28331/412020-Facing-Our-Future.pdf.

[13] *Id.* at 49-51; Susan D. Phillips, et. al., *Children in Harm's Way: Criminal Justice, Immigration Enforcement, and Child Welfare* at 22 (Jan. 2013), https://firstfocus.org/wp-content/uploads/2013/02/Children-in-Harms-Way.pdf.

per year on each foster child.[14] Prolonged detention also disrupts some of society's most important relationships by separating spouses from each other and parents from children. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015) ("'The first bond of society is marriage; next, children; and then the family.'").

Because prolonged civil detentions during federal removal proceedings can impose such heavy personal and social costs, they demand equivalently weighty and personal justifications.

B. This Court's Decisions Establish A Framework For Ensuring That Government Authorities Adequately Justify Civil Detentions

This Court has considered a variety of contexts in which government authorities seek to detain individuals for extended periods for reasons other than punishment for proven crimes.[15] In those contexts—very familiar to the States, which have the primary government role in most such situations—the Court has consistently made clear that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979) (civil commitment for mental health treatment).

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[14] Nicholas Zill, Nat'l Council For Adoption, *Better Prospects, Lower Cost: The Case for Increasing Foster Care Adoption* at 3 (May 2011), https://www.adoptioncouncil.org/files/large/9422a636dfac395.

[15] *Cf. Foucha*, 504 U.S. at 80 ("A State, pursuant to its police power, may of course imprison convicted criminals for the purposes of deterrence and retribution.").

Notably, these precedents address situations in which the case for detention can be very strong. When an individual has a severe mental illness, detention for treatment may be necessary to protect public safety—and, indeed, may be viewed as advancing the objective interests of the individual himself. Where a person is facing criminal prosecution for a serious crime, the public interests in community safety and an effective judicial process may again weigh heavily in favor of detention pending a full trial. Nonetheless, this Court has narrowly confined the circumstances under which a State may detain such individuals for more than a few days without individualized review by a neutral arbiter.

As to civil commitment for the mentally ill, for example, in our society a State may not "lock[] a person up against his will and keep[] him indefinitely" without affirmatively demonstrating, to a neutral decision-maker, not only that the individual is mentally ill but that detention is necessary to avoid a risk of physical harm to the detainee or others. *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975). Likewise, if a criminal defendant is found not guilty by reason of insanity, even if the crime was serious or violent, the government may detain the individual for supervision and treatment only so long as it can show that he remains both mentally ill and personally dangerous. *See Foucha*, 504 U.S. at 77-78. And if a defendant is found incompetent even to stand trial, the State still may not detain him, absent separate civil commitment proceedings, for more "than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain [competency] in the foreseeable future." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *see Foucha*, 504 U.S. at 79.

These due process protections are not without cost. Providing individualized consideration and neutral adjudication in thousands of cases every year can be time-consuming and expensive. *Cf. Boumediene*, 553 U.S. at 769 ("Compliance with any judicial process requires some incremental expenditure of resources."); *but see* J.A. 588 (parties' stipulation that cost of bond hearings pending completion of removal proceedings is not greater than cost of detaining class members). Moreover, requiring the government to justify any prolonged detention no doubt results in some harms caused to individuals and communities that might have been prevented if government authorities could act based on less or different evidence, or rely more on stereotypes and categorical assumptions, or continue detentions based on executive determinations without periodic review by a neutral arbiter. Consistently, however, this Court has balanced the interests involved in these situations in a manner that favors the basic principle of freedom from restraint.

Although that principle imposes burdens on even well-intentioned public authorities, the amici States recognize that it also protects the liberty of our people. We strongly endorse this Court's continuing vigilance to ensure that the Constitution likewise adequately restrains prolonged detentions of non-citizens by federal immigration authorities. This is especially important at a time when non-citizens have become the repeated targets of open fearmongering and political attacks. Particularly at such a time, the courts must demand proper and individualized justification for any prolonged executive detention. "Mere public intolerance or animosity" toward "those whose ways are different ... cannot constitu-

tionally justify the deprivation of a person's physical liberty." *O'Connor*, 422 U.S. at 575.

C. Equivalent Protections Should Apply Where The Federal Government Seeks To Detain Individuals During Removal Proceedings

This Court has recognized that cases dealing with other types of civil detention are relevant in the immigration context. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Rejecting a broad assertion by the federal government that "alien status itself [could] justify indefinite detention" of a non-citizen already held to be removable, the Court emphasized that it has previously countenanced civil detention only "in certain special and 'narrow' nonpunitive 'circumstances' where a special justification, such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Id.* at 690, 692 (citation omitted; quoting *Foucha*, 504 U.S. at 80, and *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)). Even where there is such a justification, the Court has held that due process requires the use of "constitutionally adequate procedures to establish the grounds for ... confinement." *Foucha*, 504 U.S. at 79.

The Court should now make clear that the Constitution provides equivalent protections for non-citizens whom federal authorities seek to detain for prolonged periods during removal proceedings. No doubt the federal government will be able to show that some individuals must be detained because they pose a danger to the community or a risk of flight. It should not, however, be permitted to detain individual non-citizens for prolonged periods on the basis of group classifications, assumptions, or stereotypes.

The strong personal, community, and public interests in avoiding lengthy and unnecessary immigration-related detentions warrant the same sort of procedural protections that our society provides for other civil detainees.

The most basic of these protections is the right to an individualized assessment, before a neutral adjudicator, of the asserted need for the detention. *See, e.g.*, *Foucha*, 504 U.S. at 77-83 (emphasizing need for individualized showing of proper, current grounds for detention). In these proceedings, the detaining authority normally has the burden of justifying any extended detention, which it typically must carry by providing clear and convincing evidence of a current basis and need for the detention. *See Addington*, 441 U.S. at 433 (mental illness); *Foucha*, 504 U.S. at 86 (continued detention based only on asserted danger to community); *Salerno* 481 U.S. at 751 (describing statutory protections for pretrial arrestees).

In addition, the Court has considered the length of detention a highly relevant factor in the due process analysis. *See Salerno* 481 U.S. at 747 (pretrial detention permissible in part because of "stringent time limitations of the Speedy Trial Act"); *Demore v. Kim*, 538 U.S. 510, 513, 529-530 (2003) (detention permissible in part because it typically lasted for only a "brief period"). Where detention is or may be prolonged, the Court has also looked to the availability of periodic review to ensure that the grounds asserted by the government to justify the detention remain current and valid. *See Hendricks*, 521 U.S. at 363-364 (post-sentence detention of sexually violent criminals allowed in part because of required annual reassessment); *Foucha*, 504 U.S. at 77-83 (need for new showing when conditions or grounds for detention

change); *cf. Jackson*, 406 U.S. at 738 (detention on ground of incompetence to stand trial "must be justified by progress toward" regaining competency; otherwise, government must establish new ground for continued detention).

The respondents in this case seek essentially the same basic protections. The federal petitioners have responded that special features of the immigration context justify providing less protection for non-citizens in removal proceedings. *See, e.g.*, U.S. Supp. Br. 33-34. The amici States offer the perspective of coordinate governments that also routinely face the need to balance considerations of personal liberty against those of public safety and orderly legal procedure. Moreover, as discussed above, many of the non-citizens whose protection is at issue are also state residents and members of our communities. From these perspectives, the federal government's arguments are unpersuasive.

Federal primacy in immigration matters, for example, does not justify denying non-citizen state residents basic due process protections. Even in this area, exercises of federal power are "subject to important constitutional limitations." *Zadvydas*, 533 U.S. at 695.[16] These should include the requirement of individualized determinations of flight risk and dangerousness pending the completion of removal proceedings.

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[16] *Cf. INS v. Chadha*, 462 U.S. 919, 940-942 (1983) (Congress must chose a "constitutionally permissible means of implementing" its authority over immigration law); *Jordan v. De George*, 341 U.S. 223 (1951) (deportation statute must satisfy void-for-vagueness doctrine).

Requiring such an individualized assessment likewise does not impinge on federal authority to control admission into the United States. *See* U.S. Supp. Br. 19-21. Allowing non-citizens who do not pose demonstrable risks of dangerousness or flight to continue their ordinary activities while the government seeks to establish that they should be deported—and they seek to establish that they should not—will not change the legal standards governing those questions, or confer any otherwise unavailable right to enter or remain in the United States.[17] Similarly, providing standard due process protections does not require allowing individuals subject to removal proceedings to live "at large." *See* U.S. Supp. Br. 20. Respondents have made clear that they do not contest the government's ability to subject them, during such proceedings, to appropriate monitoring short of physical detention. *See* Resp. Supp. Br. 36-37; *see also Zadvydas*, 533 U.S. at 695-696.

Finally, that some persons who are not detained may then abscond or commit crimes does not justify detaining all non-citizens based on broad categorical judgments, without an individualized demonstration of substantial risk. *See* U.S. Supp. Br. 44-45. The amici States of course share concerns about public safety and improper flight—in this context as in others. In case after case, however, this Court has made

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[17] It is worth recalling that a significant number of individuals who are placed in removal proceedings do establish a right to remain. For example, more than 71% of those in the respondent class have sought relief from removal, and roughly one-third of those who have sought it have prevailed. *See* Pet. App. 19a; *see also* Resp. Supp. Br. 4-6 (nearly two-thirds of Arriving Subclass members and two-fifths of Mandatory Subclass members prevail at removal proceedings).

clear that categorical fears are not a constitutionally sufficient basis for extended detentions. Indeed, a central principle of the civil detention cases is that a decision so profoundly restricting personal liberty must be based on an individualized demonstration of real need—not on group stereotypes or unsubstantiated fears. *Compare Korematsu v. United States*, 323 U.S. 214, 218-219 (1944). This is the standard our society applies in the face of risks potentially posed by those charged with but not yet convicted of serious crimes, and by those whose mental illness could make them dangerous or has even already led to criminal acts. *See, e.g., Salerno*, 481 U.S. at 750 (arrestees); *O'Connor*, 422 U.S. at 574 (mentally ill); *Jackson*, 406 U.S. at 738 (individual incompetent to stand trial); *Foucha*, 504 U.S. at 83 (individual previously acquitted based on legal insanity). We should not allow the federal government to apply a lower standard in making detention decisions concerning non-citizen state residents potentially subject to removal.

Of course, the procedures required by due process can vary considerably depending on particular circumstances. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). In a few situations, for example, there might be genuine questions of "terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security." *Zadvydas*, 533 U.S. at 696. But those situations are the exception, not the norm, and they are not involved here.[18] It is vital that vague invocations

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[18] For instance, this case does not involve detention of (continued...)

of phrases such as "national security" or "terrorism" not be allowed to justify erosion of fundamental liberties such as the freedom from physical restraint. Speaking as governments themselves, the amici States believe that the basic procedural protections sought by respondents will, in most cases, strike an appropriate balance between individual liberty interests and the federal government's need to detain noncitizens in removal proceedings who present a genuine risk of flight or community danger. And any substantially lower constitutional standard risks empowering federal authorities to subject our noncitizen residents and community members to unjustified or even arbitrary detentions.

(...continued)
suspected terrorists under a special statutory provision. *See* Pet. App. 5a-6a; *see also* 8 U.S.C. §§ 1226a, 1537.

CONCLUSION

If this Court reaches the constitutional questions presented by this case, it should hold that the Constitution requires appropriate procedural protections when the federal government seeks to detain individuals during removal proceedings for prolonged periods.

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Supreme Court of the United States

DAVID JENNINGS, *et al.*,

Petitioners,

v.

ALEJANDRO RODRIGUEZ, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTEREST OF *AMICI CURIAE*[1]

Amici, listed in the appendix to this brief, are non-profit organizations serving immigrant detainees through legal education and direct representation. Collectively, Amici visit more than 40 detention centers in 13 states, serving more than 53,000 individuals per year. Amici have a deep interest in the due-process rights of all noncitizens and write to refute the suggestion that lawful permanent residents (LPRs) rarely face prolonged detention under 8 U.S.C. § 1225 upon return to the United States, and to address the constitutional concerns that are implicated by such a practice. Amici believe their extensive experience serving detained noncitizens, including detained returning LPRs, will help the Court in considering this case.

Amici include The National Immigrant Justice Center, American Gateways, Capitol Area Immigrants' Rights Coalition, Centro Legal De La Raza, The Florence Immigrant and Refugee Rights Project, Immigrant Defenders Law Center, The Northwest Immigrant Rights Project, The Pennsylvania Immigration Resource Center, Political Asylum Immigration Representation Project, Refugee and Immigrant Center for Education and Legal Services, and The Rocky Mountain Immigrant Advocacy Network. Amici's statements of interest are in the appendix to this brief.

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[1] Counsel for all parties have consented in writing to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Amici agree with Respondents' position in its entirety, and write specifically to refute two central themes in the Government's brief concerning individuals detained under 8 U.S.C. § 1225. The Government asserts that few LPRs are in fact improperly subject to extended detention without access to a bond hearing upon return to the United States. It also asserts that prolonged detention of LPRs without bond hearings raises no serious constitutional concerns, and that the Ninth Circuit's avoidance of those concerns is a radical departure from this Court's jurisprudence. Both of these contentions are wrong.

I. First, the Government suggests that—at least in cases involving noncitizens designated as "arriving aliens"—constitutional violations are "rare." Pet'rs' Br. 14. To the extent this is a legal conclusion, it is wrong. And if the Government is suggesting, as a factual matter, that it is "rare" for LPRs to suffer extended detention, it is unsupported, and there is every reason to believe the contrary. Amici regularly encounter LPRs who are returning to the United States from brief travel abroad and who are detained as applicants for admission, often based on old or minor criminal convictions. Many of these individuals have plausible arguments against the inadmissibility charges or are ultimately granted immigration relief (*e.g.*, cancellation of removal, *see* 8 U.S.C. § 1229b, or a waiver of their criminal conviction, *see* 8 U.S.C. § 1182(h)), but they are often forced to be detained for the duration of their proceedings to seek that remedy. In Amici's experience, those proceedings can take months or years, and they often turn on complicated

legal and factual questions. This experience is confirmed by numerous cases before the Board of Immigration Appeals (BIA) and in federal courts involving LPRs who have been detained and charged with grounds of inadmissibility.

Under the regime that the Government advocates, the best a returning LPR can hope for is release on parole from an officer of the Department of Homeland Security (DHS). This option, says the Government, is good enough. But there are at least three problems with that contention. First, under the Government's theory, many returning LPRs won't be eligible for parole (Pet'rs' Br. 28), because they will be subject to inadmissibility under § 1182(a)(2), also a ground of mandatory detention. 8 U.S.C. § 1226(c)(1)(A). Second, the parole procedures are constitutionally insufficient: they grant enforcement agents unreviewable detention authority, which is often exercised in one-page boilerplate denials that result in prolonged, arbitrary detention. Third, there is not even a mechanism to contest the arriving-alien designation; once DHS makes such a designation it has sole control over the release *vel non* of a returning LPR. An immigration judge is barred from considering whether a returning LPR should actually be designated as an arriving alien and thus subject to detention without a bond hearing. The limits on immigration judges in this context are particularly troublesome because, in Amici's experience, cases involving returning LPRs often involve complex challenges to the arriving-alien designation itself.

II. Contrary to the Government's assertion that the decision below represents an impermissible revision of a long-standing legal regime, the Ninth Circuit's

decision in fact follows directly from over a century of this Court's cases construing immigration statutes—including those involving LPRs—to avoid serious constitutional concerns. The constitutional-avoidance canon is a long-accepted tool used to effectuate congressional intent, and it is premised on the "reasonable presumption that Congress did not intend [to enact laws that] raise[] serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). This Court has repeatedly gone to great lengths to avoid construing statutes to raise constitutional doubts.

Indeed, for over a century, this Court has repeatedly construed immigration statutes to contain significant procedural and substantive limitations to avoid constitutional concerns. For example, the Court has: required notice and an opportunity to be heard when the statute did not expressly require it, *Yamataya v. Fisher*, 189 U.S. 86 (1903); construed ambiguous language to ensure impartial decision making in deportation hearings, *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); limited seemingly unbounded language to ensure that criminal consequences only attached to conduct related to the deportation statute's purpose, *United States v. Witkovich*, 353 U.S. 194, 195 (1957); and refused to read immigration statues to provide for potentially indefinite detention of noncitizens without bond hearings, imposing a presumptive six-month limit on such post-order detention, *Zadvydas v. Davis*, 533 U.S. 678 (2001).

The Court has also repeatedly limited immigration statutes to protect the due-process rights of LPRs. The Court has refused to read immigration statutes

to subject LPRs to deportation based on capricious circumstances, construing the ambiguous term "entry" to prevent LPRs who had made involuntary or brief trips abroad from having made an "entry" that could result in deportation. *Delgadillo v. Carmichael*, 332 U.S. 388, 390-92 (1947); *Rosenberg v. Fleuti*, 374 U.S. 449, 458-62 (1963). The Court has also read statutes applicable to LPRs to contain substantial procedural limitations, construing them to provide deportation hearings, *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-98 (1953), and to impose a heightened burden of proof despite statutory silence on the issue, *Woodby v. INS*, 385 U.S. 276, 286 (1966).

The decision below rests comfortably in this long tradition, and correctly construed the statute to avoid serious constitutional doubts and to effectuate Congress's intent to follow the Constitution. As explained in depth in Respondents' brief (Resp'ts' Br. 42-48), Congress has not "inescapably said" that LPRs must be must be detained for prolonged period of time without a bond hearing. *Chew*, at 601-02. Thus, it is "fairly possible" (and indeed necessary) to construe Section 1225(b) to avoid the serious constitutional doubts created by subjecting LPRs—full-fledged members of American society—to prolonged detention without bond hearings.

ARGUMENT

I. PROLONGED DETENTION OF LPRS WITHOUT BOND HEARINGS IS FAR FROM RARE, AND IT RAISES GRAVE CONSTITUTIONAL PROBLEMS

The Government implies that LPRs are infrequently detained under Section 1225(b), and that this practice "does not raise constitutional

doubts." *See* Pet'rs' Br. 26-29. A close reading of its brief shows that the Government does claim outright that extended detention is rare (though it may be suggesting this), but merely that when it happens, it is constitutional. This assertion is inaccurate, and it largely misses the point. There are certainly noncitizens who are detained under Section 1225 but then released on parole, and others whose proceedings are resolved promptly. These individuals are not the subject of this litigation. Instead, the question is whether detention under Section 1225 is permissible for members of the Plaintiff class, *i.e.*, in cases of prolonged detention. With this subset in mind, the Government's assertion that detention under Section 1225 is "clearly constitutional in virtually all of its applications" as to the "overwhelming majority of aliens" is an inaccurate, straw-man argument. Pet'rs' Br. 29. The Government's regular practice of detaining LPRs—who are full-fledged members of American society protected by the Due Process Clause—for prolonged periods of time without bond hearings raises deeply troubling constitutional concerns.

A. Immigration statutes, as interpreted by the Board of Immigration Appeals, provide for the detention of returning LPRs.

Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996)—the current statutory scheme governing immigration detention—certain LPRs returning from brief trips abroad can be, and in fact frequently are, subject to detention without bond hearings, often for prolonged periods.

Specifically, the Government denies bond hearings to certain detained "applicants for admission" who are stopped at a port of entry. 8 U.S.C. §§ 1225(a)(1), 1225(b)(2)(A); 8 C.F.R. § 236.1(c)(2). The BIA has held that IIRIRA overturned longstanding precedent that declined to treat returning LPRs as if they were initial entrants when they returned after brief trips abroad. *Matter of Collado-Munoz*, 21 I. & N. Dec. 1061 (BIA 1998) (en banc). Following IIRIRA, the BIA treats returning LPRs as "seeking admission into the United States" whenever they "fall into any of six enumerated categories" in the statute. *Vartelas v. Holder*, 132 S. Ct. 1479, 1485 (2012) (citing § 1101(a)(13)(C)).

Thus, LPRs who leave the country for any reason may be treated as "seeking admission" and detained as "arriving aliens" for lengthy periods without access to a bond hearing if, for example, they have committed various (often minor) offenses at some point prior to travel. *See* 8 U.S.C. § 1101(a)(13)(C)(v); *see, e.g.*, *Matter of Abosi*, 24 I. & N. Dec. 204, 205 n.1 (BIA 2007) (possession of under 30 grams of marijuana).

Prior to *Collado-Munoz*, LPRs returning from brief, non-meaningful absences were afforded the same procedural rights as LPRs remaining in the United States. *See Vartelas*, 132 S. Ct. at 1485 ("[B]efore IIRIRA, [LPRs] who had committed a crime of moral turpitude could, under the *Fleuti* doctrine, return from brief trips abroad without applying for admission to the United States."). Under the Agency's current interpretation, returning LPRs with acknowledged due-process rights, *Landon v. Plasencia*, 459 U.S. 21, 32 (1982), face extended

detention without even the possibility of an immigration judge (IJ) considering their case for bond.[2]

B. The Government regularly subjects returning LPRs to prolonged detention without bond hearings.

Moreover, the Government relies on this authority to detain returning LPRs for lengthy periods of time without a bond hearing.

1. Returning LPRs are commonly detained under Section 1225 for extended periods.

The Government implies that it is "rare" for returning LPRs to be treated as "arriving aliens," but that is simply not true. The BIA has published many cases involving LPRs returning from international travel who were treated as "arriving aliens." *See, e.g., Matter of Gonzalez Romo*, 26 I. & N. Dec. 743 (BIA 2016); *Matter of Pena*, 26 I. & N. Dec. 613 (BIA 2015); *Matter of Valenzuela-Felix*, I. & N. Dec. Dec. 53 (BIA 2012); *Matter of Guzman Martinez*, 25 I. & N. Dec.

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[2] Amici believe that *Collado-Munoz* is wrongly decided, and would urge the Court to reserve the question of its correctness, as the Court did in *Vartelas*, 132 S. Ct. at 1484 n.2. *Collado-Munoz* implicates more than detention; it affects whether an LPR returning from brief travel abroad may be removed under the grounds listed in 8 U.S.C. § 1182, or only on those within 8 U.S.C. § 1227. For instance, an LPR who commits a single moral-turpitude offense, or who is suspected but not convicted of certain offenses would not generally be removable under § 1227, but might be inadmissible under § 1182. *See, e.g., In re Jeffrey Constance Morgan*, A36 810 171, 2005 WL 3833046 *1 (BIA Nov. 16, 2005) (unpublished) (LPR detained and charged as arriving alien due to assault conviction with one day sentence, which made him inadmissible but not deportable).

845 (BIA 2012); *Matter of U. Singh*, 25 I. & N. Dec. 670 (BIA 2012); *Matter of Rivens*, 25 I. & N. Dec. 623 (BIA 2011); *Matter of A- M-*, 25 I. & N. Dec. 66 (BIA 2009); *Matter of Abosi*, 24 I. & N. Dec. 204 (BIA 2007); *Matter of Robles-Urrea*, 24 I. & N. Dec. 22 (BIA 2006); *Matter of Collado-Munoz*, 21 I. & N. Dec. 1061 (BIA 1998). This number is significant given that the BIA publishes less than 0.1 percent of the cases it decides.[3]

Publicly available information does not specify how long each of these individuals spent in detention, but Amici have been able to verify that respondents in at least half of the listed cases were detained for a prolonged period of time. [4] For instance, the Respondent in *Matter of U. Singh* spent more than 2½ years in detention while the Agency considered his eligibility for a waiver of inadmissibility. *See generally Following Fourth Circuit's Remand of Matter of* U. Singh, *BIA remands to IJ for Further Proceedings*, 90 INTERPRETER RELEASES 2192 (Nov. 18, 2013). And, the Respondent in *Gonzalez Romo* is currently detained in Arizona, where she has been for nearly 2½ years. *See* Detainee Locator, U.S. IMMIGRATION CUSTOMS & ENF'T, http://bit.ly/2dM9BWU (last visited Oct. 21, 2016) (The BIA decision indicates that she was taken into

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[3] In Fiscal Year 2015, a typical year, the BIA completed 34,244 cases and published 28 decisions. *Cf.* Exec. Office of Immigration Review, U.S. Dep't of Justice, FY 2015 Statistics Yearbook, Q2 (Apr. 2016) (2015 Yearbook); BIA Precedent Decisions, Decisions 3817-3848, http://bit.ly/2ekAR42.

[4] Details regarding the detention of these individuals are on file with Amici.

custody on May 3, 2014, and the detainee locator indicates that she is still detained.). She was detained "when she attempted to reenter as a lawful permanent resident" for an offense that, according to the BIA, makes her inadmissible even though it would not have made her removable. *Gonzalez Romo*, 26 I. & N. Dec. at 743.

Numerous circuit-court cases also involve detained returning LPRs. Many of these cases reach federal court raising legal questions regarding whether a criminal conviction involves moral turpitude or is otherwise a basis for inadmissibility. *See, e.g.*, *Escobar v. Holder*, 561 U.S. 1001 (2010) (detained a year in total); *Wilson v. Gonzales*, 471 F.3d 111 (2d Cir. 2006) (detained for at least five years); *Richardson v. Reno*, 162 F.3d 1338 (11th Cir. 1998) (detained for at least a year), *vacated*, 526 U.S. 1142 (1999).

Some returning LPRs have managed to obtain habeas relief to remedy extended detention.[5] *See, e.g.*, *Thomas v. Shanahan*, No. 26-cv-5401 (S.D.N.Y. Aug. 1, 2016); *Singh v. Shanahan*, No. 16-cv-6142 (S.D.N.Y. Sept. 14, 2016); *Rangel de los Reyes v. Pitts*, No. 16-cv-889 (W.D. Tex. filed Sept. 6, 2016). The Government speculates that some cases result from

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[5] In Amici's experience, many individuals who remain detained for prolonged periods are unable to take the steps necessary to petition for a writ of habeas corpus because they have no right to appointed counsel, limited access to legal assistance, and limited knowledge of the legal system. *See, e.g.*, Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 32 fig. 6 (2015) (studying immigration cases from 2007 through 2012 and finding that 86% of noncitizens lacked access to counsel).

recent circuit precedent like the decision below, limiting prolonged detention. Pet'rs' Br. 26, n.7. But such petitions were being brought long before this precedent. *See, e.g., Kasneci v. Dir. of Bureau of Immigration & Customs Enft*, No. 12-12349, 2012 U.S. Dist. LEXIS 119683, at *2 (E.D. Mich. Aug. 23, 2012); *Rosario v. Prindle*, No. 2011-217, 2012 WL 12920 (E.D. Ky. Jan. 4, 2012); *Velazquez v. Moore*, No. SA-08-CA-635-XR (NSN), 2008 U.S. Dist. LEXIS 91531 (W.D. Tex. Nov. 10, 2008); *Mejia v. Ashcroft*, 360 F. Supp. 2d 647 (D.N.J. 2005); *Made v. Ashcroft*, 2001 U.S. Dist. LEXIS 25611 (D.N.J. May 31, 2001).

And these cases are the tip of the iceberg. Amici examined the Board's unpublished case law that discusses noncitizens designated as "arriving aliens,"[6] and found that 34.9% of those cases involved returning LPRs.[7] Individuals who receive decisions from the BIA will on average have waited at least six

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[6] Amici searched for all arriving alien cases in the Board's published and unpublished case law, which is available in Westlaw's FIM-BIA database. Amici identified 199 out of 570 cases as involving returning LPRs who were treated as arriving aliens. It should be noted that Westlaw's selection of unpublished BIA decisions is not a complete collection of the Board's unpublished authority, as the Board releases unpublished authority selectively. Moreover, unpublished Board decisions often lack full factual exposition, and briefing before the Board is unavailable on Westlaw. Amici acknowledge these failings in the Westlaw data set, but have employed it because no better data is available.

[7] These unpublished cases generally do not specify the noncitizen's detention status, but under what the Government frames as a plain reading of the statute (Pet'rs' Br. 15-29), nearly all would have been subject to detention without access to a bond hearing under 8 U.S.C. § 1225.

months since the initiation of removal proceedings. Pet'rs' Br. 35 n.10. As explained *infra*, LPRs are detained for longer periods than other noncitizens, whether due to greater complexity of their cases or to their increased stake in continued residence in this country. *See infra* Part I.B.2.

The evidence from published and unpublished cases is consistent with Amici's on-the-ground experiences serving detained immigrants. Amici regularly encounter such detainees—their existence is far from "rare."

2. Returning LPRs often face prolonged detention because they are litigating meritorious claims.

Studies have demonstrated that individuals with lawful status—such as returning LPRs—are likely to be detained far longer than average. *See* TRAC, *Legal Noncitizens Receive Longest ICE Detention* (June 3, 2013), http://bit.ly/2dQ3J0A ("[I]ndividuals who were legally entitled to remain in the United States typically experienced the longest detention times."); *see also generally* Donald Kerwin & Serena Yi-Ying Li, Migration Policy Institute, *Immigration Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?* 16-18, 19 n.39 (Sept. 2009), http://bit.ly/2dMmqAx (noting disparities between short-term and long-term immigration detention).

Amici's experiences confirm these findings: returning LPRs face prolonged detention because litigating meritorious claims takes time and these individuals are often unable to do so outside of detention.

For example, Aldo Rangel de los Reyes, is a Mexican national who became an LPR when he was 17 years old. *See Rangel de los Reyes v. Pitts*, No. 16-cv-889 (W.D. Tex. filed Sept. 6, 2016).[8] He was detained after returning from a wedding in Mexico. The Government sent him to deferred inspection and then paroled him into the United States, instructing him to report back in one month. When he returned, in September 2015, immigration officials detained and charged him with inadmissibility, arguing that a series of dorm thefts (Mr. Rangel was in college) involved moral turpitude and made him inadmissible. In December 2015, an immigration judge granted Mr. Rangel's request for termination, finding that these offenses did not involve moral turpitude and concluding that Mr. Rangel was not removable. The Government appealed that decision and Mr. Rangel remains detained to this day, 13 months so far. During this time, he has been separated from his fiancé, children, mother, and siblings, all U.S. citizens. He is consistently fighting feelings of desperation with the end to his detention nowhere in sight.

The Petitioner in *Robles-Urrea v. Holder*, 678 F.3d 702 (9th Cir. 2012), further illustrates how prolonged these cases can be. Mr. Robles-Urrea—an LPR for more than 20 years—returned from a brief trip abroad in 2005 and was declared inadmissible for a

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[8] Amici have limited case examples to individuals who are the subject of publicly available information due to a federal-court case or a published BIA decision. Additional details about the cases, including information about the duration of detention, are on file with Amici.

2002 conviction for misprision of a felony under 18 U.S.C. § 4. The BIA found that this offense categorically involved moral turpitude. The Ninth Circuit rejected that determination and Mr. Robles-Urrea was eventually granted cancellation of removal. But fighting his case took nearly a decade. After the Agency's initial denial, he appealed to the Ninth Circuit and received a stay of removal. Following a year of detention without the possibility of a bond hearing, he withdrew his stay and returned to Mexico for the pendency of his appeal. When the Ninth Circuit granted his petition for review (after six years separated from his family), he returned to the United States to continue litigating his case, and was *again* detained as a returning LPR. He spent an additional seven months detained in Eloy, Arizona, before a judge granted his application for relief.

The Government insinuates that detention takes time because of delays on the noncitizen's part. This assertion is disingenuous. For example Mr. Rangel—whose case is described above—has been detained for more than a year despite having *never* requested a continuance. He was granted relief by a judge in December 2015, approximately three months after his initial detention and despite multiple trial-level continuances caused by the court or the Department of Homeland Security. In short, his prolonged detention results from the Government's appeal, which it filed on the last possible day (and then extended the briefing deadline). The case has been pending at the BIA for more than six months.[9]

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[9] Moreover, the Government decides how to allocate its resources, and in recent years it has chosen to prioritize, *inter*

The option to litigate these cases without simultaneously facing detention is limited to a returning LPR's access to parole. The Government claims that parole is regularly granted to returning LPRs (Pet'rs' Br. 28), but, again, in Amici's experience this is far from clear.

For example, Qingwen Chen is a Chinese national who traveled to Toronto for two days to attend his nephew's graduation, and was detained as a returning LPR at a New York airport. *See Chen v. Shanahan,* No. 16-cv-00841 (S.D.N.Y. Apr. 5, 2016). At the time, Mr. Chen had been an LPR for nine years and was previously living in the United States on a business visa. At the airport he was initially paroled into the United States, but he was ordered to check in with the immigration authorities monthly. Two weeks after his first check in, immigration officials came to his home and detained him. DHS charged him with inadmissibility based on a 2010 offense for selling counterfeit goods and welfare fraud (for which he had completed probation and paid restitution in full). His attorneys requested parole in October 2015 and received a boilerplate denial. His

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(continued)

alia, recently-arrived children and others seeking asylum, many of whom are not detained. *See* Print Maggard, Acting Chief Immigration Judge, Revised Docketing Practices Relating to Certain EOIR Priority Cases (Feb. 3, 2016), http://bit.ly/2ey7euq. Amici do not raise the point to challenge the wisdom of these priorities but to illustrate that adjudicative delays are far more in the control of the Government than of (frequently unrepresented) detained noncitizens. *See generally* Resp'ts' Br. 23-25.

attorneys then filed a petition for habeas corpus.[10] Only after this petition was filed (and after he spent seven months in detention), did immigration officials finally agree to parole him. Because of Mr. Chen's prolonged detention, his wife had to take a second job to make ends meet. He almost lost his home, and his youngest child was referred to counseling because of mental health concerns relating to her father's detention.

Mr. Rangel has had a similar experience. He has asked for parole on three separate occasions—two of which were after the judge granted termination of proceedings—and has been denied each time. He asked the judge to consider his case for bond, and the judge concluded that he lacked jurisdiction to do so. So now, Mr. Rangel has a pending petition for habeas corpus, which will only take additional time to adjudicate. *Rangel de los Reyes v. Pitts*, No. 16-cv-889 (W.D. Tex. filed Sept. 6, 2016). Notably, even if DHS's appeal to the BIA is successful, it is still not the end of the road for this individual. He remains eligible for an alternate form of relief: a stand-alone waiver of his criminal conviction under 8 U.S.C. § 1182(h).

These cases, and many others, illustrate that parole, which the Government describes as the "sole mechanism" for guarding against unconstitutional prolonged detention of returning LPRs (Pet'rs' Br. 24), is not an adequate safeguard of such an LPR's due-

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[10] *See* Pet'rs' Br. 26, n.7 (citing *Chen v. Shanahan*, No. 16-cv-00841 (S.D.N.Y. Apr. 5, 2016) (dismissed following release on parole)).

process rights. In Amici's experience, parole is routinely denied with no reason given, and with no opportunity for review of the decision. Indeed, without intervention from counsel (something unavailable to most detained noncitizens, *see* Eagly & *Schafer, supra* n.5) many individuals in this posture would likely remain detained.

3. Returning LPRs are deprived of even the inadequate protections of *Matter of Joseph*.

In *Demore v. Kim*, 538 U.S. 510 (2003), this Court found significant the possibility that an individual allegedly subject to mandatory detention could challenge that designation in a hearing under *Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999). 538 U.S. at 514 & n. 3. It is striking, then, that Petitioner does not cite *Joseph* or suggest its relevance here.

In fact, that is because the BIA has consistently found *Matter of Joseph* hearings unavailable to returning LPRs designated as "arriving aliens." *Matter of Joseph* is premised on the regulatory provision at 8 C.F.R. § 1003.19(h)(2)(ii), which permits a noncitizen to seek a determination "by an immigration judge that [she] is not properly included" in categories of cases for which individualized bond hearings are barred. But the regulations that govern whether a noncitizen is "properly included" in mandatory-detention categories only apply to specified paragraphs. The regulations do not explicitly permit such review as to the provision at 8 C.F.R. § 1003.19(h)(2)(i)(B), which bars custody determinations for individuals charged as arriving aliens.

In other words, the BIA has held that a returning LPR cannot even request a determination from an IJ that she is not properly included in the category of arriving aliens: "[t]he regulations, as currently written, do not allow either Immigration Judges or this Board to even consider whether an alien is correctly classified as an arriving alien." *In re Jose Cesario De Jesus-Rivera*, A44 333 089, 2003 WL 23521903 *1 (BIA Nov. 14, 2003) (unpublished) (reversing bond grant where IJ had terminated removal proceedings and DHS had appealed the termination). Dozens of BIA decisions confirm that this is the Board's settled view. *See, e.g., In re Israel Perez Leon*, A34 617 650, 2006 WL 901332, *1 (BIA Mar. 1, 2006) (unpublished) ("[W]here the DHS has designated an alien as an 'arriving alien,' the Immigration Judge is precluded from undertaking a determination as to the propriety of the DHS's designation."); *In re Victor Picon-Alvarado*, A90 316 931, 2004 WL 2374542 (BIA July 30, 2004) (unpublished) (same); *In re Jesus Guadalupe Maese-Castro*, A035 897 322, 2009 WL 1653771, *1 (BIA May 22, 2009) (unpublished) (same).

The Board has applied this interpretation in various contexts, without regard to the injustice worked by the inflexible application. It has deemed returning LPRs ineligible for bond hearings based on minor convictions occurring years or decades earlier. *See In re Gachelin Louis*, A042 496 475, 2009 WL 3713282, *2 (BIA Oct. 27, 2009) (unpublished) (LPR held without bond as arriving alien due to single drug possession conviction from 14 years prior to brief trip abroad). It precludes bond even for noncitizens granted relief. *In re Andrzej Stankiewicz*, A91 648 013, 2004 WL 880272, *1 (BIA Mar. 10, 2004)

(unpublished) (finding no jurisdiction over custody despite IJ grant of § 212(c) relief). The fact that a noncitizen was paroled into the United States years earlier does not matter. *See In re Thao Lee*, A028 009 671, 2009 WL 2437133, *1 (BIA July 28, 2009) (unpublished) (Laotian designated as arriving alien due to having been paroled as refugee in 1988, more than 20 years earlier).

And, as noted above, the BIA applies this rule even where the IJ finds that the returning LPR is not properly treated as an applicant for admission in the first place. *See In re Hun Dai Trang*, A28 248 701, 2005 WL 1396803 (BIA Apr. 22, 2005) (unpublished) (overturning bond of $6,500 on jurisdictional grounds where IJ terminated and DHS appealed).

For instance, on December 1, 2008, an IJ found that returning LPR Lazaro Armando Ramos Hernandez was not properly classified as an arriving alien; the IJ therefore terminated removal proceedings. *In re Lazaro Armando Ramos Hernandez*, A039 280 159, 2009 WL 1863814 *1 (BIA June 18, 2009) (unpublished).[11] Three weeks later, Mr. Ramos Hernandez was still detained, pending a DHS appeal of the termination order. So, he asked for a bond. The IJ granted bond, but DHS appealed

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[11] The immigration court system does not have a publicly available online docket, but it does maintain a case information status line which includes various details regarding removal proceedings. *See* Exec. Office for Immigration Review, U.S. Dep't of Justice, *Customer Service Initiatives*, https://www.justice.gov/eoir/customer-service-initiatives (last updated Sept. 16, 2015). The description of this case is taken from both the Board decision and from the case information status line.

again. *Id.* The BIA found that the IJ lacked authority to redetermine the bond, even though Mr. Ramos Hernandez was (in the IJ's view) not an "arriving alien." The BIA ultimately concurred with the IJ's termination of the case, but that decision did not come until April 7, 2010, 15 months after the IJ's decision terminating proceedings.

In other words, a returning LPR may challenge the allegation that she should be treated as an arriving alien (*e.g.*, because an offense did not involve moral turpitude), and may defeat removal on that ground, but even if the challenge is found meritorious, it does not permit a judge to order release from custody. The noncitizen has no recourse but to hope that the prosecutors (and their client Agency) will see fit to release her from custody while the case is litigated.

4. Returning LPRs can carry the arriving-alien designation long after reentry.

Even worse, returning LPRs can be, and often are, detained as arriving aliens long after their actual "return" to the United States. In Amici's experience, many LPRs are subject to something called "deferred inspection" when they initially present themselves at a port of entry. They are then paroled into the United States only to later be detained, sometimes at a check in, other times at home, and other times because of an interceding conviction. Even if this detention occurs *years* later, the individual is still subject to a charge of inadmissibility as an "arriving alien."

For example, in September of 2006, Miguel de Jesus Familia Rosario (who was then 60 years old) left the United States to travel to his native Dominican Republic. *Rosario v. Prindle*, No. 2011-217, 2012 WL 12920 (E.D. Ky. Jan. 4, 2012). When he

returned to the United States, he was not granted admission but was instead subject to deferred inspection. A year later, Mr. Familia pleaded guilty to aiding and abetting a conspiracy (for distributing condoms with knowledge that they would be used by individuals engaged in prostitution). The Government conceded that he was "a minor participant" in the conspiracy, and he was sentenced to time served: 28 days. In 2010, nearly five months after the conclusion of his criminal case and over 33 months after he was released from jail, the Government initiated removal proceedings, arguing that Mr. Familia was inadmissible under 8 U.S.C. § 1182(a)(2). In the end, a three-year long deferred inspection resulted in nearly two years in immigration detention separated from his family and children, all LPRs or U.S. citizens. He repeatedly requested both parole and bond. The Agency denied parole, and the immigration judge found that he lacked jurisdiction to consider Mr. Familia for bond because he was an "arriving alien." Mr. Familia had to file a petition for habeas corpus in order to obtain release even when it had been determined that he was eligible for relief in the form of cancellation of removal (which he was later granted).

This ongoing treatment of returning LPRs as "arriving aliens," potentially for years after their actual return from international travel, only further undermines the Government's general contention that individual who are detained under Section 1225 are unknown to the United States and are at the threshold of their initial entry to the United States.

C. Prolonged detention of LPRs without a bond hearing raises serious constitutional doubts.

The Government's argument that detention of LPRs "under Section 1225(b) does not raise constitutional doubts," Pet'rs' Br. 26, incorrectly minimizes the extensive constitutional protections LPRs receive, given their deep ties to this country. While Amici believe that all noncitizens subject to Section 1225 have due-process rights to be free from arbitrary detention, prolonged detention of returning LPRs without bond hearings presents particularly severe constitutional concerns.

LPRs are full-fledged members of American society, who are granted the right to reside permanently in the United States. 8 U.S.C. § 1101(a)(20). LPRs, "like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society." *In re Griffiths*, 413 U.S. 717, 722 (1973). Indeed, "many [LPRs] have lived in this country longer and established stronger family, social, and economic ties here than some who have become naturalized citizens." *Woodby v. INS*, 385 U.S. 276, 286 (1966).

In light of LPRs' special status, they enjoy robust constitutional protections. "[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence[,] his constitutional status changes accordingly." *Plasencia*, 459 U.S. at 32. An LPR's "weighty" interest in remaining in the United States implicates the "right to stay and live and work in this land of freedom"—and in many cases, "the right to rejoin [his or her] immediate family, a right that ranks high among the interests of the individual." *Id.* at 34 (internal

quotation marks omitted). Thus, it is well established that LPRs "may not be deprived of . . . life, liberty or property without due process of law"—whether present in the country or returning from brief international travel. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953); *see also Plasencia*, 459 U.S. at 29, 32 (LPRs returning from brief absences are entitled to the same constitutional protections they would have received had they not traveled abroad).

The due-process rights enjoyed by LPRs include freedom from unnecessary prolonged detention without adequate procedural protections. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty" protected by the Due Process Clause. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Civil detention can only be justified by "certain special and narrow nonpunitive circumstances, where a special justification, such as harm-threatening mental illness, outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Id.* (internal quotation marks and citation omitted).

Prolonged civil detention of individuals entitled to the full protection of the Due Process Clause, without adequate "procedural protections" to ensure that continued detention is actually necessary, presents obvious constitutional problems. *See id.* at 690-92. In many cases, returning residents (even those amenable to removal proceedings) pose no serious risk of flight or safety threat—and plainly either risk is far too low to rationally justify a *conclusive* presumption that LPRs detained under Section 1225(b) must never be afforded bond hearings.

Prolonged detention of LPRs without bond hearings is thus extremely constitutionally dubious. *See id.*

II. THE DECISION BELOW CORRECTLY INTERPRETED THE STATUTE TO AVOID SERIOUS CONSTITUTIONAL PROBLEMS, IN ACCORDANCE WITH OVER A CENTURY OF THIS COURT'S JURISPRUDENCE

The Government's argument that prolonged detention of LPRs without bond hearings accords with a supposedly "unbroken legal tradition" gets it backwards. Pet'rs' Br. 20. Rather, for over a century, this Court has consistently avoided construing immigration statutes concerning LPRs and other noncitizens in ways that would raise serious constitutional doubts, in order to effectuate congressional intent. The decision below that follows inexorably from this Court's jurisprudence.

A. For over a century, this Court has consistently construed immigration statutes to avoid serious constitutional doubts.

The Government's contention that the decision below "flies in the face of . . . this Court's precedents" and works a "radical judicial revision of the legal regime that has protected our Nation's borders for a century" is flatly wrong. Pet'rs' Br. 16, 21. Rather, the decision below follows directly from this Court's longstanding practice of construing the immigration statutes to avoid serious constitutional doubts—in order to effectuate Congress's intent to abide by the Constitution. Much as the decision below did, this Court has repeatedly "read *significant* limitations into" immigration statutes to avoid serious constitutional doubts. *See Zadvydas*, 533 U.S. at 689

(emphasis added) (citing *United States v. Witkovich*, 353 U.S. 194, 195 (1957)).

1. The constitutional-avoidance canon is a vital tool to effectuate congressional intent.

The constitutional-avoidance canon of statutory construction, applied by the Ninth Circuit below, is a familiar tool used to effectuate Congress's intent. It is based on the "presumption that Congress did not intend" to compel a construction of a statute "which raises serious constitutional doubts," unless a competing interpretation of the statute is not "plausible." *See Clark v. Martinez*, 543 U.S. 371, 381 (2005). "This canon is followed out of respect for Congress," which of course is presumed to "legislate[] in the light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). As Congress "swears an oath to uphold the Constitution," courts must not "lightly assume that Congress intended to infringe constitutionally protected liberties." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988).

Under the avoidance canon, whenever "a serious doubt [regarding a statute's] constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is *fairly possible* by which the question may be avoided." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (emphasis added) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). That is, "the Court will construe the statute to avoid such problems unless such construction is *plainly contrary* to the intent of Congress." *Edward J. DeBartolo Corp.*, 485 U.S. at

575 (emphasis added). Indeed, "*every reasonable construction* must be resorted to, in order to save a statute from unconstitutionality." *Id.* (emphasis added) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). While the canon does not permit courts to "judicially rewrit[e]" statutes raising serious constitutional doubts, the "Court will [nonetheless] often strain to construe legislation so as to save it against constitutional attack." *Heckler v. Mathews*, 465 U.S. 728, 741 (1984) (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964)).

2. This Court has repeatedly limited immigration and other statutes to avoid serious constitutional doubts.

This Court has reiterated, for more than 100 years, the principle that to avoid serious constitutional doubts, "significant limitations" must be read into immigration statutes when necessary and fairly possible. *See Zadvydas*, 533 U.S. at 689.

At least as far back as *Yamataya v. Fisher*, 189 U.S. 86 (1903), this Court has read immigration statutes to contain necessary procedural protections to avoid constitutional doubts when the statute did not explicitly exclude such protections. To avoid serious constitutional problems, the Court read the immigration laws to require notice and a hearing before deportation of a noncitizen who had been present in the country for just four days. *Id.* at 97-98, 101-02. Because the statutes at issue "d[id] not necessarily exclude opportunity to the immigrant to be heard," the Court refused to construe the statute to "disregard the fundamental principles that inhere in 'due process of law.'" *Id.* at 100. The Court explained that an "interpretation ought to be adopted

[that], without doing violence to the import of the words used, will bring [the statute] into harmony with the Constitution." *Id.* at 101. Thus, since the statute's "words . . . [did] not *require* an interpretation that would" vest the executive with "absolute, arbitrary power" to deport, the Court construed the statute to provide for notice and hearing to avoid the serious constitutional problem. *Id.* (emphasis added).

In *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), *superseded by statute as stated in Ardestani v. INS*, 502 U.S. 129 (1991), the Court applied the constitutional-avoidance canon to read the immigration laws to require deportation hearings to be adjudicated by an independent and neutral officer, rather than one simultaneously charged with investigative and prosecutorial functions. *Id.* at 45-51. This separation of functions was required by the Administrative Procedure Act only when "required by statute." *Id.* at 48. Even though the immigration statute at issue did not explicitly require such a hearing, the Court applied the avoidance canon to construe the statute to require such a hearing (and the consequent separation of prosecutorial and adjudicative functions). *Id.* at 49-51. The Court reasoned that a contrary reading "might" bring the immigration statute into "constitutional jeopardy," given the potentially life-and-death stakes involved in deportation proceedings. *Id.* at 49-51. Such a construction did not "do[] violence to the import of the words used," and was therefore required to avoid the grave constitutional problems posed by vesting the same individual with adjudicative and prosecutorial functions in deportation proceedings. *Id.*

The Court has also avoided constitutional doubts by limiting seemingly unbounded language. In *United States v. Witkovich*, 353 U.S. 194 (1957), the Court avoided serious due-process problems by construing a grant of authority to the Attorney General to ask noncitizens whatever questions he "deem[s] fit and proper" as limited to questions "reasonably calculated to keep the Attorney General advised regarding the continued availability for departure of aliens." *Id.* at 197. While the statutory text seemed to be "unbounded," and would allow the Attorney General to ask whatever questions he pleased, the Court applied "[a] restrictive meaning for what appear to be plain words" because the "broader meaning would generate constitutional doubts." *Id.* at 199. Specifically, the broad reading would raise constitutional doubts by "giv[ing] an official the unlimited right to subject a man to criminal penalties for failure to answer absolutely any question the official may decide to ask." *Id.* at 198, 202 (internal quotation marks omitted). Because the purpose of the overall legislative scheme was to ensure noncitizens' availability for departure, it was a "permissible and therefore an appropriate construction to limit the statute to authorizing" questions relating to serving that purpose. *Id.* at 202.

Indeed, the Court has recently applied the concept of constitutional avoidance to questions regarding immigration detention, the issue presented here. In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court applied the constitutional-avoidance canon to "read an implicit limitation into" a statute providing for potentially indefinite detention of certain removable noncitizens, including LPRs. *Id.* at 689. To avoid the "serious constitutional problem" presented by

indefinite detention, the Court read the statutory provision that "an alien 'may' be detained after removal" to limit such "detention to a period reasonably necessary to bring about that alien's removal from the United States." *Id.* at 689. Because the statute lacked "any clear indication of congressional intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed," the Court construed the statute to avoid the serious constitutional problem. *Id.* at 697-99. Moreover, in order to guide lower courts in applying the correct construction of the statute, the Court imposed a presumption that post-removal order detention becomes unreasonable when it exceeds six months.[12] *Id.* at 701.

In sum, when grave constitutional concerns are present, the Court has repeatedly read ambiguous language and statutory silence to contain procedural

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[12] The Court has also applied the avoidance canon to read similar procedural limitations into statutes outside of the immigration context. *See, e.g., United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 368 (1971) (construing an obscenity statute to contain implicit time limits for commencing and completing judicial proceedings). Similarly, the Court has construed statutes that authorize deprivations of liberty or property to require notice and a meaningful opportunity to be heard, "[n]otwithstanding the absence of express statutory language." *Burns v. United States*, 501 U.S. 129, 137-38 (1991). Even in the face of statutory "silence," the Court has repeatedly inferred various "statutory protections essential to assuring procedural fairness." *Id.* at 138 (collecting cases). Where the statute "does not *clearly state*" that Congress meant to eliminate such protections, the Court will "decline to impute such an intention to Congress" in order to avoid "confront[ing] [a] serious [due process] question." *Id.* (emphasis added).

protections, and read seemingly unbounded language to contain implicit limits.

3. This Court has repeatedly applied the avoidance canon to afford procedural protections for LPRs.

The Court has also repeatedly applied the avoidance canon in the face of the grave constitutional concerns presented when LPRs—who are full-fledged members of American society—are deprived of vital procedural and substantive protections.

For example, in *Delgadillo v. Carmichael*, 332 U.S. 388 (1947), the Court construed the term "entry" not to include an LPR's involuntary departure and return to the country. *Id.* at 391-92. Although it was possible to read the term "entry" to include "*every* return of an alien from a foreign country," the Court declined to adopt that broad construction in light of the serious constitutional concerns presented by deporting LPRs "irrational[ly]" based on "fortuitous and capricious" circumstances. *Id.* at 390-91 (emphasis added).

Then, in *Rosenberg v. Fleuti*, 374 U.S. 449, 458 (1963), the Court construed the term "entry" not to include an LPRs' voluntary but brief departure and return to the United States. By that point, the statutory definition of "entry" had been amended to incorporate the *Delgadillo* exception for involuntary departures. *Id.* at 452. While the statute and legislative history only explicitly referenced involuntary departures, the Court nonetheless refused to deem an LPR's two-hour voluntary trip abroad to be an entry potentially subjecting him to deportation. *See id.* at 462-63. In light of the serious constitutional concerns presented, the Court refused

to read the statute "woodenly," and instead read the exceptions to the definition of entry "nonrestrictively" to exclude brief voluntary departures as well. *Id.* at 459-62. This construction was necessary in order to "obviate[]" the need to reach the serious constitutional problems presented. *Id.* at 463.

Similarly, in *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), the Court considered an immigration statute which seemed to deprive LPRs of a right to be heard before being deported by denying a hearing to certain "excludable" noncitizens. *Id.* at 599. The Court declined to read the statute in this manner, finding that Congress had not "inescapably" denied LPRs hearings. *Id.* at 601. Given the grave constitutional concerns with denying LPRs vital procedural protections such as the right to be heard, the Court refused to read the term "excludable" noncitizens to cover LPRs. *Id.* at 599. The Court reasoned that Congress had not used the term "expulsion," which the Court opined would be "the term that would apply naturally to aliens who are [LPRs]." *Id.* Accordingly, Congress had not "*inescapably said*" that the LPR could be excluded without a hearing. *Id.* at 601-02 (emphasis added). Therefore, the Court avoided serious constitutional doubts by reading the statute to provide the LPR with notice and a hearing. *Id.*

In *Woodby v. INS*, 385 U.S. 276 (1966), the Court avoided serious due-process concerns by reading an immigration statute to require proof of deportability by clear and convincing evidence, rather than by a preponderance of the evidence. Deporting LPRs under the lower burden of proof raised serious constitutional concerns, given the "drastic

deprivations" that follow from deporting LPRs who have developed strong ties to the United States. *Id.* at 487-88. Though Congress had "not addressed" the applicable standard of proof and the statute was silent on the matter, the Court construed the statute to avoid the serious constitutional concerns with deporting LPRs absent sufficient procedural protections. *Id.* at 284. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 572 (1990) (explaining that *Woodby* "relied heavily on constitutional considerations" in construing the statute).[13]

In sum, the Court has a long tradition of construing the immigration laws to contain significant limitations to avoid serious constitutional problems—including many prominent examples of cases involving LPRs. Given the weighty constitutional interests at stake, ambiguous language, statutory silence, and seemingly unbounded language have not prevented the Court from doing so. As discussed below, the Ninth Circuit's decision here follows directly from that long tradition—and it correctly construed the statute to avoid grave constitutional doubts.

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[13] For the reasons discussed in Respondents' brief, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), is inapplicable here. *See* Resp'ts' Br. 28-30.

B. The decision below correctly applied this Court's precedents to avoid grave constitutional problems.

The Ninth Circuit's decision here correctly followed the extensive authority discussed above to avoid the serious constitutional concerns implicated by subjecting LPRs to prolonged detention without bond hearings. Given those doubts, "*every reasonable construction* must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp.*, 485 U.S. at 575 (emphasis added) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Here, it is "fairly possible" to construe the statute not to allow for prolonged mandatory detention of LPRs without adequate procedural safeguards, and the Ninth Circuit was therefore correct to construe the statute to contain that limitation. *See Zadvydas*, 533 U.S. at 689. And the Court must do so to effectuate Congress's intent to abide by the Constitution. *Edward J. DeBartolo Corp.*, 485 U.S. at 575.

Congress did not explicitly exclude the possibility of bond hearings when detention becomes prolonged. As explained in Respondents' brief, Sections 1225(b)(1)(B)(ii) and 1225(b)(2)(a) do not apply to detention once removal proceedings have begun. *See* Resp'ts' Br. 42-47. And even if they did, the statute does not address the length of detention or the possibility of bond hearings at all. *See* Resp'ts' Br. 43-44, 47-48.

Moreover, Congress has not "inescapably said" that LPRs must be detained for prolonged period of time without a bond hearing under Section 1225(b). *Chew*, 344 U.S. at 602. Because the statute does not

expressly address extended detention, it follows that it does not "necessarily" dictate that LPRs must be subject to prolonged detention without bond hearings. *Zadvydas*, 533 U.S. at 697. It is "[i]n that respect . . . ambiguous." *Id.* The availability of bond hearings must be construed in light of the serious constitutional problems which arise in that context. *See Wong Yang Sung*, 339 U.S. at 49-51. Statutory silence may be read to contain such limitations, as this Court has repeatedly found. *See, e.g.*, *Woodby*, 385 U.S. at 284 (imposing heightened burden of proof when statute was silent); *see also Witkovich*, 353 U.S. at 197-99 (reading seemingly unbounded language to contain limitations). Because the statute does not provide "any clear indication of congressional intent" to subject LPRs to prolonged detention without bond hearings, it is "fairly possible"—and indeed necessary—to adopt a limiting construction of Section 1225(b) to avoid the serious constitutional doubts created by the Government's construction. *Zadvydas*, 533 U.S. at 689.

This limiting construction must be applied to all arriving aliens detained under Section 1225, given the grave constitutional problems raised by prolonged detention of LPRs without bond hearings. In determining whether a construction of a statute raises serious constitutional doubts, the Court considers whether *any* application of that statutory construction would raise such doubts. Even if some applications of a statutory construction are constitutionally benign, it is the "lowest common denominator"—the presence of any constitutionally doubtful application—that matters here. *Clark*, 543 U.S. at 380. Therefore, Section 1225(b) must be construed in light of the grave constitutional

problems with subjecting LPRs to prolonged detention without bond hearings. And as demonstrated above, the Government routinely detains LPRs without bond hearings under Section 1225 in ways that are unconstitutional.

Therefore, this Court should follow its many prior cases construing the immigration laws to avoid serious constitutional doubts, and affirm the judgment of the Ninth Circuit.

CONCLUSION

The reasonable limitations adopted below are necessary to avoid doubts about the statute's constitutionality. They should be affirmed in their entirety.

Respectfully submitted,

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October 24, 2016

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APPENDIX

APPENDIX—LIST OF *AMICI CURIAE*

American Gateways is a non-profit organization serving noncitizens in Central Texas. American Gateways' mission is to champion the dignity and human rights of refugees and immigrant survivors of persecution, torture, conflict, and human trafficking through legal services at no or low cost, education, and advocacy. As part of its mission, American Gateways provides know your rights presentations and assisted pro se workshops to more than 10,000 individuals annually at four immigration detention centers in Texas. We regularly encounter individuals who are subjected to prolonged detention by immigration officials, including LPRs who are returning to the United States from travel abroad. We have observed first-hand the difficulties that these and other long-term detainees experience in accessing legal counsel and advocating for their rights. For these reasons, American Gateways is committed to the importance of access to bond hearing for long term detainees.

The Capital Area Immigrants' Rights (CAIR) Coalition strives to ensure equal justice for all immigrants at risk of detention and deportation in the D.C. metropolitan area and beyond through direct legal representation, know your rights presentations, impact and advocacy work, and the training of attorneys defending immigrants in the immigration and criminal justice arenas. The CAIR Coalition regularly sees immigrant men, women, and children who struggle daily with the trauma and hardship that accompany indefinite, long-term detention. While noncitizens are detained for

prolonged periods, their mental and medical statuses decompose and their U.S. citizen and LPR relatives suffer great hardship. Noncitizens in long-term detention are less equipped to apply for relief because many are isolated from their families and unable to produce evidence, often due to the isolation produced by detention in remote areas without reliable phone access. For these reasons, CAIR Coalition believes that all detained immigrants in removal proceedings should be free from indefinite detention and have the right to request release on bond through an individualized review of their circumstances.

Centro Legal de la Raza (Centro Legal) was founded in 1969 to provide culturally and linguistically appropriate legal aid services to low-income residents of Oakland's Fruitvale District and the greater Bay Area. Centro Legal's Immigration Project provides legal representation and consultations to detained and non-detained immigrants, refugees and asylum seekers throughout Northern California. Annually, Centro Legal advises and/or represents over a thousand detained individuals before the immigration courts and Board of Immigration Appeals each. Centro Legal provides legal right presentations and consultations three times a month to individuals in immigration detention at the West County Detention Facility and the Mesa Verde Detention Center in Bakersfield, California. Centro Legal also represents clients before the detained immigration court from these facilities as well as two others: the Rio Consumes Correction Center and the Yuba County Jail. As Centro Legal provides legal education, consultations and direct service representation to a high volume of detained individuals, it has a substantial interest in

the present case, and in ensuring that all noncitizens are able to pursue immigration remedies without facing the prospect of prolonged detention.

The Florence Immigrant and Refugee Rights Project (Florence Project) is a Legal Orientation Program site of the Executive Office of Immigration Review. As such, the Florence Project provides orientation services to detained adult men and women as well as unaccompanied minors in removal proceedings. In 2015, over 11,000 detained children, men, and women facing removal charges observed a Florence Project presentation on immigration law and procedure. That same year, the Florence Project provided individualized *pro se* support services to approximately 2,500 detained adult immigrants. Every year, the Florence Project also directly represents individuals before the Immigration Judge and Board of Immigration Appeals. All of the adult immigrants we assist are detained by ICE and in removal proceedings in remote locations in Florence and Eloy, Arizona. In any given year we see hundreds of long term LPRs who have been detained as a result of criminal convictions, many of whom may seek relief in the form of termination of proceedings, waivers for their convictions, or cancellation of removal. Each year, a significant number of those LPRs are brought into custody from a port of entry where they were designated as an arriving alien seeking admission, typically as a result of criminal convictions. Such individuals often have meritorious arguments for relief, but remain detained for months and years. The Florence Project firmly believes that there must be appropriate constitutional limits on the application of mandatory detention provisions, particularly when such provisions impact LPRs.

The Immigrant Defenders Law Center (ImmDef) is an independent, non-profit law firm dedicated to advancing social justice for Southern California's most marginalized immigrant and refugee communities through legal services, community empowerment, and advocacy for adults and children in federal immigration custody and their families. ImmDef's objective is to preserve families and communities by empowering individuals to know their rights in the immigration system, providing access to legal representation, and advocating for social change. In 2016, ImmDef will provide legal representation to approximately 625 clients in their immigration removal proceedings and will provide "Know Your Rights" classes to a total of approximately 2,000 individuals. The Immigrant Defenders Law Center is particularly concerned about the outcome of this case because as attorneys for noncitizen men, women, and children, we acutely understand that prolonged detention is a challenge that affects not only an individual's wellbeing but also her access to legal representation. Without lawyers in immigration court, most noncitizens, and especially children, are unable to effectively access justice and vindicate their right to obtain relief to which they are entitled.

The National Immigrant Justice Center (NIJC) is a Chicago-based national non-profit, accredited since 1980 by the Board of Immigration Appeals (BIA) to represent individuals in removal proceedings. Though its staff and network of more than 1,500 pro bono attorneys, NIJC has a long history of providing education and representation to low-income immigrants, refugees, and asylum seekers, especially when those individuals are detained. NIJC provides

legal education in the form of Know Your Rights presentations or Legal Orientation programming to detainees in seven detention centers scattered across four states (Illinois, Wisconsin, Indiana, and Kentucky). Through that programming NIJC and its partners provided educational programming to 3500 individuals in the last fiscal year. Given this work, NIJC has a deep interest in the due-process rights of noncitizens in removal proceedings, including LPRs, to be free from prolonged detention without the possibility of release on bond.

Northwest Immigrant Rights Project (NWIRP) is a nationally-recognized legal services organization based in Washington State. Each year, NWIRP provides direct legal assistance in immigration matters to over 9,000 low-income people from over 150 countries, speaking over 60 different languages and dialects. NWIRP also strives to achieve systemic change to policies and practices affecting immigrants through impact litigation, public policy work, and community education. Founded in 1984, NWIRP serves the community from four offices in Washington State in Seattle, Granger, Tacoma, and Wenatchee. NWIRP is the only organization on the List of Pro Bono Legal Service Providers for Washington State that is distributed to unrepresented individuals facing removal proceedings by the local immigration court. NWIRP has a deep interest in the subject of this litigation because it provides legal assistance each year to thousands of individuals facing removal proceedings who are detained at the Northwest Detention Center in Tacoma, Washington, and has experienced first-hand the adverse impact of prolonged detention on the wellbeing of noncitizens in immigration custody.

The Political Asylum/Immigration Representation Project (PAIR) is a non-profit organization in Boston and the leading provider of pro bono legal services to indigent immigrants and asylum seekers in Massachusetts, including those who are detained by DHS in the region. At any given time, PAIR is representing or advising several hundred asylum-seekers and immigration detainees with active removal cases, who originally came from over 90 countries worldwide. Since all of PAIR clients are low-income, they are unable to afford counsel on their own and must rely on pro bono counsel to seek protection from deportation. PAIR regularly conducts legal rights presentations and intakes for immigration detainees at three regional detention centers. During these visits, PAIR staff and volunteers provide a legal rights presentation, and then screen individual cases. In addition to these in-person presentations, PAIR conducts intake over the telephone with immigration detainees. PAIR provides presentations to and consultations with over 600 new immigration detainees a year and has had occasion to speak to many individuals who have experienced prolonged detention, including LPRs and those who have recently arrived in the United States.

The Pennsylvania Immigration Resource Center (PIRC) is a non-profit organization whose mission is to serve vulnerable immigrant populations in Pennsylvania. Through the Department of Justice's Legal Orientation Program, PIRC provides legal orientations, pro se deportation relief workshops, and pro bono referrals to individuals with cases before immigration judges and the BIA. All of the individuals who receive services through our detained programs are detained by DHS at the York

County Prison or the Berks County Residential Center, and the population includes family units and young children. PIRC also provides free direct representation to vulnerable detained individuals, with a focus on asylum seekers, survivors of trauma, the indigent, and those with competency issues. Through this work, PIRC provides educational programming and/or direct representation to approximately 2,000 detained individuals each year.

The Refugee and Immigrant Center for Education and Legal Services (RAICES) is a BIA-recognized, non-profit, legal services agency with seven offices throughout Texas. RAICES seeks justice for immigrants through a combination of legal and social services, advocacy, policy, and litigation. In 2015, RAICES provided legal services to over 10,000 individuals, including an extensive number of detained adults. In the past year, RAICES has provided legal services to individuals detained at nine detention centers in Texas and has frequently encountered individuals facing improper prolonged detention. RAICES believes that all noncitizens, whether they are new arrivals to the United States or have been present in this country for a period of time, should be able to pursue immigration remedies without facing prolonged detention.

The Rocky Mountain Immigrant Advocacy Network (RMIAN) is a nonprofit legal advocacy organization that serves two of the most vulnerable immigrant populations in Colorado: men and women in immigration detention, and immigrant children who have suffered from abuse, neglect, or violence. RMIAN's Detention Program provides direct removal-defense representation, educational

programming, and other services to people detained at the immigration detention center in Aurora, Colorado, including individuals designated as arriving aliens. In 2015, RMIAN served over 1,700 individuals at the immigration detention center in Aurora, Colorado. RMIAN has an interest in ensuring that noncitizens – particularly those who are detained, and consequently have limited access to both legal representation and evidence for their cases – are afforded the due process rights to which they are entitled.

RECORD
AND
BRIEF

No. 15-1204

In the Supreme Court of the United States

DAVID JENNINGS, *ET AL.*,

Petitioners,

v.

ALEJANDRO RODRIGUEZ, *ET AL.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Pursuant to this Court' Order dated December 15, 2016, supplemental briefing in this action presents three questions:

1. Whether the Constitution requires that aliens seeking admission to the United States who are subject to mandatory detention under 8 U.S.C. § 1225(b) must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months.

2. Whether the Constitution requires that criminal or terrorist aliens who are subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months.

3. Whether the Constitution requires that, in bond hearings for aliens detained for six months under Sections 1225(b), 1226(c), or 1226(a), the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community, whether the length of the alien's detention must be weighed in favor of release, and whether new bond hearings must be afforded automatically every six months.

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No. 15-1204

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("EFELDF") is a nonprofit corporation founded in 1981.[1] For more than thirty-five years, EFELDF has defended American sovereignty and promoted adherence to federalism and the separation of powers under the U.S. Constitution. In addition, EFELDF has consistently opposed unlawful behavior, including illegal entry

[1] This *amicus* brief is filed with written consent of all parties; the parties' written consents have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief; no party's counsel authored this brief in whole or in part, nor did any person or entity other than *amicus*, its members, and its counsel make a monetary contribution to the preparation or submission of this brief.

into and residence in the United States, and supported enforcing immigration laws. For all these reasons, EFELDF has direct and vital interests in the issues before this Court.

STATEMENT OF THE CASE

On behalf of a class of aliens detained by the Los Angeles District of the Immigration and Customs Enforcement ("ICE"[2]) for six months or longer, awaiting the resolution of their removal or admission process, a group of aliens (hereinafter, "Aliens") have sued the Field Office Director and several higher-ranking federal officers (collectively, the "Government") to seek periodic bond hearings at which an immigration judge can assess Aliens' eligibility for bail, in light of the class members' flight risk and danger to the community. The lower courts divided the class into three subclasses, based on the statutes under which the aliens are detained: Sections 1225(b), 1226(c), and 1226(a). 8 U.S.C. §§1225(b), 1226(a), (c). Of the three subclasses, only the Section 1225(b) detainees already received an initial bail hearing. The other two classes are also known as the "Arriving Class" for aliens taken into custody at the border, 8 U.S.C. §1226(a), and the "Mandatory Class" for convicted criminals in removal proceedings, *id.* §1226(c). In addition to claiming a due-process right to periodic bond hearings, Aliens also seek favorable procedural facets connected to those hearings, such as shifting the burden of proof to the Government.

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[2] ICE is the successor within the Department of Homeland Security ("DHS") of the former Immigration and Naturalization Service ("INS").

Constitutional Background

Congress – and thus its enforcement and rule-making delegates in the Executive Branch – have plenary authority over immigration. U.S. CONST. art. I, §8, cl. 4; *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972). While "[i]t is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings," *Reno v. Flores*, 507 U.S. 292, 306 (1993), it is at least as well established that "detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process." *Demore v. Kim*, 538 U.S. 510, 523 (2003). The due-process inquiry thus concerns what process is due in a particular setting. In general, courts intervene only when detention ceases to serve its immigration role – such as when detention becomes permanent, and thus punitive – because the detention then leaves the immigration context – which allows it – and becomes a potential due-process violation. *Zadvydas v. Davis*, 533 U.S. 678, 697 (2001).

Under Article III, federal courts are limited to hearing cases and controversies, U.S. CONST. art. III, §2, which is relevant here primarily in the "bedrock requirement" of standing. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). This limit is "fundamental to the judiciary's proper role in our system of government." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976). In both its constitutional and prudential strands, standing is "founded in concern about the proper – and properly limited – role of the courts in a democratic society." *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (interior

quotations and citations omitted). Indeed, standing is "*crucial* in maintaining the tripartite allocation of power set forth in the Constitution." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (interior quotations omitted, emphasis added).

Statutory Background

The parties outline federal immigration law, Gov't Br. at 2-8; Aliens Br. at 2-5, so *amicus* EFELDF focuses only on the statutory provisions salient to this brief, which are the preclusion-of-review provisions. 8 U.S.C. §§1252(g), 1226(e). Because they go to jurisdiction but were not set out in the appendix, *amicus* EFELDF sets them out in full here.

First, §1252(g) broadly limits any cause arising from the Government's decision to commence proceedings against any alien under the Immigration and Naturalization Act, 8 U.S.C. §§1101-1537 ("INA"):

> Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

8 U.S.C. §1252(g) (citations omitted).

Second, §1226(e) limits judicial review of the Government's "discretionary judgment" regarding the application §1226:

> The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

8 U.S.C. §1226(e).

Regulatory Background

The Government's implementing regulations provide for bail hearings, but only upon material changes from the prior bond determination:

> After an initial bond redetermination, an alien's request for a subsequent bond redetermination shall be made in writing and shall be considered only upon a showing that the alien's circumstances have changed materially since the prior bond redetermination.

8 C.F.R. §1003.19(e).[3]

Factual Background

EFELDF adopts the facts as stated in the Government's supplemental brief (at 10-17). In summary, "when class members' cases were completed, the alien was virtually always found removable and usually ordered removed." Gov't Suppl. Br. at 16. Indeed, "[f]ewer than 5% of studied

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[3] In addition to the material-change regulation, DHS may release aliens into the United States on parole, "on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. §1182(d)(5)(A).

class members with completed cases won a 'termination.'" *Id.* (*citing* J.A. 199). In other words, "more than 95% were found removable," *id.*, which means that they lacked any substantive right to be at liberty inside the United States.

SUMMARY OF ARGUMENT

Before addressing the three questions presented by the supplemental briefing order, *amicus* EFELDF first discusses the jurisdictional and prudential issues that go to whether this Court can or should reach the merits issues under the Constitution.

At the outset, the systemic-review aspect of this hybrid *habeas* action violates preclusion-of-review provisions, including both statutory provisions, 8 U.S.C. §§1252(g), 1226(e), and nonstatutory ones, 5 U.S.C. §§701(a), 702, 704, which implicates the lack of a waiver of sovereign immunity and, thus, a lack of jurisdiction (Section I.A). Moreover, the fact that Aliens have no right to be at large in the United States means that they cannot manufacture that right by voluntarily coming or staying here under the available terms and then protesting those terms, which trigger both a lack of entitlement to equitable relief and a self-inflicted injury in their detention for purposes of Article III (Section I.B). Similarly, to have procedural standing for their bond hearings, Aliens need to establish a concrete and cognizable injury, which they generally cannot do because they lack concrete rights vis-à-vis their liberty to be at large in the United States (Section I.C). In essence, Aliens seek facial relief in a facial challenge to detentions longer than six months, which this Court should dismiss because in most of the instances here, the

detention is perfectly legal under the Due Process Clause (Section I.D). Even if Aliens would have an Article III case or controversy in their individual habeas actions, the Declaratory Judgment Act does not create jurisdiction for a piecemeal review of the bond-hearing issue that Aliens ask this Court to resolve (Section I.E). Finally, the immediate-custodian rule makes the director of the detention facility the only proper respondent to Aliens' habeas petition, and the other defendants-respondents must be dismissed (Section I.F).

With regard to the merits of the three questions presented, *amicus* EFELDF respectfully submits that Aliens are not entitled to any relief. As to both classes, Aliens' lack of a right to be in the United States works against their entitlement to a bond hearing, absent a factor – such as dilatory Government behavior or a material change, for which hearings remain available by regulation and via habeas review, without this litigation – and Aliens' theorizing otherwise based on policy arguments and conjecture do not negative the Government's legitimate position under the rational-basis test that applies in the absence of a fundamental right or protected class (Section II.A). In any event, this Court's precedents foreclose relief for both the Arriving Class (Section II.A.1) and the Mandatory Class (Section II.A.2). The Government should not bear the burden of proof in bond hearings because this Court has upheld instances where the detainees bore that burden and because the default rule in civil cases is that the plaintiff or movant (here, Aliens) bears the burden of proving entitlement to the relief it seeks (Section II.B.1). Because this is a rational-basis type

of due-process claim in which the movants have no right to release, the burden – if the Government bears it at all – should not be an elevated burden (Section II.B.2). Finally, for similar reasons, this Court should not require considering length of detention in bail hearings because that would likely lead to more delay, and in any event this Court should force Aliens to file a rulemaking petition before allowing a time-barred claim against the bond-hearing rule, especially when Aliens raise policy-based arguments that they did not submit to the agency during the prior notice-and-comment rulemaking (Section II.B.3).

ARGUMENT

I. THIS LITIGATION DOES NOT PROVIDE AN APPROPRIATE VEHICLE TO DECIDE CONSTITUTIONAL QUESTIONS.

For several jurisdictional and prudential reasons, this litigation is not an appropriate vehicle for the systemic review of alien removal procedures that the courts below promulgated under the Due Process Clause. For those reasons, in addition to reversing the Ninth Circuit's statutory holdings, this Court should deny constitutional relief either prudentially or jurisdictionally.

A. Outside of the original *habeas corpus* action, judicial review is precluded by statute and sovereign immunity.

Although this case began as a pure *habeas corpus* action, the third – and operative – amended complaint combines an aspect of systemic review of immigration policy: "This action is both a complaint for declaratory and injunctive relief under 28 U.S.C. 1331 and a petition for writ of habeas corpus under 28 U.S.C.

2241[.]" Third Am. Compl. ¶2 n.1. Whether that type of bootstrapping might work in some contexts, the Aliens cannot bring such a suit against our federal sovereign in this immigration context. Even if §1331 provides the district courts with general subject-matter jurisdiction for federal questions, that subject-matter jurisdiction does not address the immigration-specific preclusion-of-review statutes or the United States' sovereign immunity.

Of course, the "United States, as sovereign, is immune from suit save as it consents to be sued." *U.S. v. Sherwood*, 312 U.S. 584, 586 (1941). A waiver of sovereign immunity is thus a necessary prerequisite to a court's exercise of jurisdiction over the United States. *See, e.g., U.S. v. King*, 395 U.S. 1, 4 (1969). Such a waiver "must be unequivocally expressed in the statutory text" and "strictly construed, in terms of its scope," in favor of the sovereign. *Lane v. Pena*, 518 U.S. 187, 192 (1996). "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit," without regard to any perceived unfairness, inefficiency, or inequity. *Dept. of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999). Here, the relief afforded Aliens by the courts below exceeds the limited relief available.[4]

To support the complaint's assertion that "28 U.S.C. 1331 ... confers jurisdiction to consider federal

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[4] The "officer suit" exception in *Ex parte Young*, 209 U.S. 123 (1908), provides a limited exception to sovereign immunity, but only for *ongoing violations* of federal law. *Green v. Mansour*, 474 U.S. 64, 66-67 (1985). Accordingly, the only relief available against the United States would apply to individual *Zadvydas*-like cases, not to all detained Aliens.

questions," Third Am. Compl. ¶2, the Aliens rely principally on *Walters v. Reno*, 145 F.3d 1032, 1052 (9th Cir. 1998), in which the Ninth Circuit rejected the Government's objection to an injunction against future deportations. There, the Government – which did not question jurisdiction generally – cited 8 U.S.C. §1252(g) as precluding any injunctive relief for future class members. Even if it did not involve other statutes and issues, *Walters* would not be binding on either this Court or the Government in this case. *Compare Montana v. U.S.*, 440 U.S. 147, 153 (1979) *with U.S. v. Mendoza*, 464 U.S. 154, 162 (1984).[5] If the lower courts lacked jurisdiction for the systemic-review facets of this case, no such relief is available here, even if the parties have not briefed the jurisdictional issues here.[6]

As to sovereign immunity, the 1976 amendments to 5 U.S.C. §702 "*eliminat[ed]* the sovereign immunity defense in *all equitable actions* for specific relief against a Federal agency or officer acting in an official capacity." *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1982) (*quoting* S. Rep. No. 996, 94th Cong., 2d Sess. 8 (1976); H.R. Rep. No. 1656, 94th Cong., 2d Sess. 9 (1976), 1976 U.S. Code Cong. & Admin. News 6121, 6129) (R.B. Ginsburg, J.). But that

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[5] The other case that Aliens cite – *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005) – concerns availability of §1983 actions to review parole-release procedures. *See* Third Am. Compl. ¶2. Because *Wilkinson* concerned state actors, the federal government's sovereign immunity obviously was not at issue.

[6] "Although the parties did not raise the issue in their briefs on the merits, we must first consider whether we have jurisdiction to decide this case." *Demore*, 538 U.S. at 516 (*quoting Florida v. Thomas*, 532 U.S. 774, 777 (2001)).

waiver itself has restrictions, including withholding of "authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought," 5 U.S.C. §702, and – for issues not expressly reviewable by statute – allowing review only where "there is no other adequate remedy in a court." *Id.* §704. Here, legally adequate review is available under the allowance for *habeas corpus*, and that review in the immigration context has several limits on review that preclude resort to §702's broad waiver.

In *Demore*, this Court held that §1226(e) does not preclude "challenges [to] the statutory framework that permits ... detention without bail." 538 U.S. at 516-17. *Amicus* EFELDF respectfully submits that the Court's reasoning in *Demore* does not save Aliens here for three reasons.

First, unlike in *Demore*, Aliens here claim a due-process right to compel the Government to use less-intrusive alternative to detention (*e.g.*, intensive supervision). *See* Aliens Suppl. Br. at 7, 28, 36-37. Weighing detention versus supervised release is precisely the "discretionary judgment regarding the application of this section" that §1226(e) shields from review.

Second, and along the same lines, §1252(g) precludes both statutory and nonstatutory review "to hear *any* cause or claim by or on behalf of any alien *arising from* the decision or action by the Attorney General to *commence proceedings, adjudicate cases*, or execute removal orders." 8 U.S.C. §1252(g) (emphasis added). Unlike §1226(e), §1252(g) applies beyond §1226 and extends more broadly than §1226(e)'s

"discretionary judgment" to reach "*any* cause or claim ... *arising from* the decision ... to commence proceedings ... against any alien under this Act." 8 U.S.C.S. §1252(g) (emphasis added); *see also* 5 U.S.C. §701(a)(2) (precluding review of "agency action ... committed to agency discretion by law").

Third, the nonstatutory review provisions in the Administrative Procedure Act ("APA") and its waiver provision cut against review.[7] Because statutory preclusion-of-review provisions apply here, 8 U.S.C. §§1252(g), 1226(e), the United States' general waiver of sovereign immunity does not apply. 5 U.S.C. §702; *accord id.* §701(a)(1). Similarly, the *habeas corpus* remedy is a legally adequate one, even if class members prefer other methods of review. Transcript of Oral Argument at 42:17-24, *Jennings v. Rodriguez*, No. 15-1204 (U.S) (hereinafter, "Transcript"). As such, the waiver of sovereign does not extend to alternate procedures because there is an adequate *habeas* remedy. 5 U.S.C. §§702, 704.

In short, the Court's decision to review systemic issues in *Demore* is not supportable here. This should not be surprising, moreover, because – unlike in *Demore* – the statutory scheme has not broken down here (*i.e.*, the removal proceedings are all on track, with an end in sight).

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[7] The Court perhaps should distinguish between non-statutory review and special forms of statutory review, as the enactment of statutes such as the APA has rendered "nonstatutory" something of a "misnomer." *Air New Zealand Ltd. v. C.A.B.*, 726 F.2d 832, 836-37 (D.C. Cir. 1984) (Scalia, J.).

B. In almost all – if not all – cases, the alien's detention is the alien's choice.

The detentions here are all in service of pursuing the detainee's decision to try to gain entry into or avoid removal from the United States. Each detainee is free to pursue that legal issue – entry or removal – from abroad.[8] The only thing that keeps most – and probably all – class members in detention is their own decision to remain here while the process resolves. To the extent that the detainees have a credible fear that they would face persecution in their homeland, other countries are available. Thus, although the Aliens try to analogize their detentions to compelled detention in the criminal or civil contexts that apply to residents of this Nation, that analogy is inapposite. Contrary to compelled detainees, the detainees here "carry the keys of their prison in their own pockets." *Penfield Co. v. SEC*, 330 U.S. 585, 590 (1947) (interior quotations omitted). The detainees' ability to escape detention by simply leaving the United States undermines Aliens' claims in two respects, one that goes to the equities and one that goes to jurisdiction.

First, because the detainees choose detention over the other perfectly viable and lawful choice – leaving the United States – they cannot credibly ask a court to compare them to lawful residents facing compelled civil or criminal detention. In general, the detainees

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[8] Of course, if any particular detainee – for whatever reason – cannot go *anywhere* else in the world while the parties resolve that detainee's right to reside in the United States, detention might cease to serve the intended immigration function, and that detainee could seek relief under the rationale of *Zadvydas*. But that is for the detainee to establish. *See* Section II.B.1, *infra*.

have no right to be in the United States, *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application"), and thus can be excluded as an act of sovereignty.[9] *Id.* Since no one is keeping them here, they cannot credibly challenge the legislative grace that allows them to stay at the taxpayers' expense.[10]

Second, under standing's causation requirement, a "self-inflicted injury" cannot manufacture an Article III case or controversy. *Clapper v. Amnesty Int'l USA*, 133 S.Ct. 1138, 1152-53 (2013); *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976). *Amicus* EFELDF does not dispute that the detainees have an Article III case or controversy with the United States as to the question of whether the detainees can remain here, but "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 & n.5 (2006). Aliens cannot bootstrap a *Due Process claim* to release into the United States when their actual case involves only an *immigration claim* as to whether they can enter or remain in the United States. Pending the resolution of their immigration claim, Aliens must choose

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[9] Although they end up in a similar legal posture, *see* Section II.A.2, *infra*, legal permanent residents ("LPRs") who lose their LPR status upon conviction of certain crimes are different in this respect: they have been admitted into the United States.

[10] Whether detainees knew the law or not prior to coming to the United States, they are charged with knowing the law: "We have long recognized ... that ignorance of the law will not excuse any person, either civilly or criminally." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 581 (2010) (interior quotations omitted).

between detention and leaving. The choice they make does not entitle them to raise new claims.

Simply put, these aliens have no right to remain in or be at large in the United States, *Plasencia*, 459 U.S. at 32, and they cannot manufacture that right by coming here and then protesting the terms of being here. *Clapper*, 133 S.Ct. at 1152-53. Having the right to a determination of admissibility does not create the right to reside in the United States while the system answers the first question. If they want the certainty of avoiding detention during the pendency of the immigration proceedings, Aliens need to apply for admission or non-removability from abroad.

C. Aliens lack independent standing to bail hearings without showing a concrete injury.

As indicated in Section I.B, *supra*, Aliens lack an independent right to be in the United States while their immigration proceedings resolve. Attempting to avoid the Government's claim to plenary authority over admissions, Aliens claim to "seek procedures as to their detention rather than their admission." Aliens Suppl. Br. at 20. Because they lack a substantive right to be in the United States, however, Aliens also lack a procedural right to bail hearings beyond those already afforded them (*e.g.*, upon material change in their circumstances or *habeas corpus* rights).

Under Article III, Aliens cannot have a procedural due-process right without having a substantive right first: "the procedures in question [must be] designed to protect some threatened concrete interest of his that is the ultimate basis of his standing," which is "apart from his interest in having the procedure

observed." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.8 (1992); *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) ("deprivation of a procedural right without some concrete interest that is affected by the deprivation – a procedural right *in vacuo* – is insufficient to create Article III standing"); *cf. Christopher v. Harbury*, 536 U.S. 403, 414-15 (2002) (denial-of-access rights are "ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court"). The Due Process Clause does not afford Aliens the right to be released into the United States pending resolution of their immigration proceedings. *Plasencia*, 459 U.S. at 32; *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 212 (1953); *Demore*, 538 U.S. at 523 ("detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process"). Alternatively, the Court could analyze the issue as statutory standing. *See* Section II.A, *infra*. Either way, Aliens do not have a procedural-only right to a bond hearing because they lack a concrete right to be released into the United States pending the end of their admissions or removal procedures.

D. Aliens cannot use a class-action suit to set facial rules for future individualized hearings when many – indeed most – class members have no claim to relief.

Although this case commenced as a *habeas corpus* action, it subsequently morphed into a facial, systemic challenge to removal procedures under federal immigration law. In seeking periodic bond hearings, with burdens of proof, standards of review, and a ruling as to the impact of the duration of detention in

a bond hearing, Aliens' suit seeks relief utterly removed from the specific facts of any one litigant. Any yet, most of the litigants would not be entitled to the relief that Aliens seek as a class, if the individual litigants were analyzed individually. *Amicus* EFELDF respectfully submits that this Court should recognize this as a facial challenge and then dismiss it because Aliens failed to "establish that no set of circumstances exists under which the Act would be valid." *U.S. v. Salerno,* 481 U.S. 739, 745 (1987). Quite the contrary, the Government's policies are valid in most, if not all, circumstances presented by this litigation.

Of course, a "facial challenge to a legislative Act is ... the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Salerno,* 481 U.S. at 745. Because "[t]he fact that [the law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid," *id.*, prevailing in an as-applied challenge is simply not the same as prevailing in a facial challenge. *Sorrell v. IMS Health Inc.,* 131 S.Ct. 2653, 2665 (2011); *I.N.S. v. Nat'l Ctr. for Immigrants' Rights,* 502 U.S. 183, 188 (1991). Because "[a]s-applied challenges are the basic building blocks of constitutional adjudication," *Gonzales v. Carhart,* 550 U.S. 124, 168 (2007) (interior quotations and alterations omitted), this Court has ample reason to decline the facial systemic relief that Aliens seek

Generally, where relief would reach beyond the particular parties' circumstances, the party seeking that relief "must ... satisfy [the] standards for a facial

challenge to the extent of that reach." *Doe v. Reed*, 561 U.S. 186, 194 (2010). Similarly, where the complaint's "claims are better read as facial objections" to the law, courts need "not separately address the as-applied claims." *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2340 n.3 (2014). Quite simply, there is little to distinguish facial challenges from class challenges like this one. Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855, 886 (Mar. 2015) ("facial challenge to the constitutionality of a statute, regulation, ordinance, or policy can be thought of as an implicit class action"). This Court should recognize that, while styled initially under *habeas corpus*, this litigation is a facial challenge to federal removal procedures.

Aliens cannot use heightened burdens that a few class members allegedly face to alleviate other class members from burdens that this Court's precedents deem tolerable. In short, neither Aliens nor the lower courts can use this litigation as a vehicle to adopt immigration policy via court decree for all aliens: "The statute may forthwith be declared invalid to the extent that it reaches too far, but otherwise left intact." *Brockett v. Spokane Arcades*, 472 U.S. 491, 504 (1985). Thus, a reviewing court would need to tailor the injunctive relief to the actual violations (if any), as distinct from the "blunderbuss" facial injunction proposed here. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992).[11] Because the

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[11] Our common-law tradition and its limits are particularly compelling here, where the existence of Aliens' *habeas corpus* action depends in part on the Suspension Clause. *INS v. St. Cyr*,

claims here easily fail the *Salerno* test, this Court should either remand with orders to dismiss or reject the availability of class-wide declaratory relief on so thin a record of actual constitutional concerns.[12]

E. The Declaratory Judgment Act does not expand this Court's jurisdiction to cover the procedural protections Aliens seek.

Although the Declaratory Judgment Act, 28 U.S.C. §§2201-2202, "expands the scope of available remedies" that a federal court can provide, it "does not expand [the court's] jurisdiction." *Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 71 n.15 (1978). The prospective declaratory relief that Aliens seek would be an expansion of the relief available in their core *habeas corpus* action or actions, making the additional declaratory relief that Aliens request an improper expansion of the judicial review authorized under the *habeas* statutes. *See* 28 U.S.C. §§2241-2243. But more importantly, the relief that Aliens seek would not resolve the case or controversy that Aliens have with the United States (namely, their detention).

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533 U.S. 289, 300-01 (2001) ("at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789'") (*quoting Felker v. Turpin*, 518 U.S. 651, 663-64 (1996)).

[12] Aliens claim that the Government waived any objection to whether typicality and commonality are present by failing to appeal the class-certification rulings. Transcript, at 45:1-15. But declaratory relief is discretionary, Section I.E, *infra*, and this Court can decline to issue facial, systemic declaratory relief under the Constitution to a class that clearly does not deserve the relief. 28 U.S.C. §2201(a).

Under this Court's precedents on the Declaratory Judgment Act,[13] that is an insufficient basis on which to issue declaratory relief. *Pub. Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 246 (1952) (declaratory relief inappropriate because the "proposed decree cannot end the controversy"); *Calderon v. Ashmus*, 523 U.S. 740, 749 (1998) (declaratory relief improper where it "would not completely resolve [petitioner's] challenges, but would simply carve out one issue in the dispute for separate adjudication"). To the extent that Aliens lack standing for their procedural claims, separate from their immigration claims, *see* Sections I.B-I.C, *supra*, the Declaratory Judgment Act clearly cannot extend Aliens' claims to include the procedural claims. But even if Aliens satisfy Article III, the Declaratory Judgment Act's discretionary nature, 28 U.S.C. §2201(a) ("any court of the United States, upon the filing of an appropriate pleading, *may* declare the rights and other legal relations of any interested party") (emphasis added), would justify this Court's declining to grant constitutional relief on this record.

F. Director Jennings is the only proper defendant-respondent.

Consistent with the plain language of the *habeas corpus* statute, 28 U.S.C. §2241, the common-law "immediate custodian rule" makes the director of the detention facility the only proper respondent here.

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[13] The All Writs Act cited by Aliens, Third Am. Compl. ¶2, is inapposite, both because 8 U.S.C. §1252(g) specifically precludes resort to it and, more importantly, because the requested relief here does not *preserve* future appellate jurisdiction, 28 U.S.C. §1651(a), given that Aliens can pursue their claims independently both in detention and from abroad.

Rumsfeld v. Padilla, 542 U.S. 426, 434-36 (2004); *Schlanger v. Seamans*, 401 U.S. 487, 489-91 (1971). The non-custodial Executive-Branch officials are improper respondents, *id.*, and must be dismissed.

II. IF IT REACHES THE CONSTITUTIONAL MERITS, THIS COURT SHOULD RULE FOR THE GOVERNMENT.

As indicated, either as a prudential or jurisdictional matter, this Court should – and potentially must – dismiss Aliens' claims without granting the merits relief that Aliens seek. To the extent that it reaches the merits of Aliens' claims, this Court should deny that relief for the reasons argued by the Government, as well as the reasons outlined below.

A. Six months of detention do not trigger Due Process rights for aliens.

Although Aliens understandably resent detention pending completion of their immigration proceedings, they simply have no right to be in the United States until those proceedings resolve, *Plasencia*, 459 U.S. at 32, and "detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process." *Demore*, 538 U.S. at 523.[14] Quite simply, the Due Process Clause does not aid Aliens here because "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is

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[14] As explained in Section I.B, *supra*, Aliens' analogy to civil and criminal commitment hearings is inapposite because Aliens lack the due-process rights that citizens and residents have in those other proceedings. *Reno v. Flores*, 507 U.S. 292, 305-06 (1993) ("in the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens") (interior quotations omitted).

concerned." *Mezei*, 345 U.S. at 212 (interior quotations omitted).

While understandable, Aliens' preference for supervised release over detention is neither an entitlement nor a constitutional command: "when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal." *Demore*, 538 U.S. at 528. While good policy arguments may support supervised release in some instances, a grant or denial of that relief is purely discretionary and thus unreviewable. 8 U.S.C. §§1252(g), 1226(e); *see* Section I.A, *supra*.

Moreover, wholly apart from an individualized due-process analysis for a particular alien, federal authorities – either Congress or its delegates in the Executive Branch – may legitimately have concluded that such supervised release would act as a magnet for further illegal immigration (*i.e.*, come to the United States, spend six months in detention, and get released). *Cf.* 8 U.S.C. §1601(6) ("[i]t is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits"). That *possibility* suffices to rebut Aliens' theoretical arguments that Aliens deserve release because good arguments correlate with lengthy proceedings, and released aliens will not want to abandon those good arguments by absconding. Transcript, at 52:9-19. *Amicus* EFELDF respectfully submits that that type of rule would result in more protracted proceedings, but the Court need not address Aliens' conjecture.

Quite simply, under the rational-basis test, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data," *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).[15] Consequently, rational-basis plaintiffs must "negative every conceivable basis which might support [the challenged statute]," including those bases on which the state plausibly *may have* acted. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (internal quotations omitted). By contrast, plaintiffs cannot prevail even by marshaling "impressive supporting evidence ... [on] the probable consequences of the [statute]" vis-à-vis the legislative purpose, but must instead negate "the *theoretical* connection" between the two. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463-64 (1981) (emphasis in original). Aliens' conjecture – while not evidence – would not help Aliens, even if it were evidence.

In any event, this Court already has resolved the issue that Aliens raise. Provided that the detention is neither punitive nor indeterminate, detention during the resolution of the immigration proceedings here does not violate Due Process. *Demore*, 538 U.S. at 523. In situations like this, "where justice is supposed to be swift but deliberate," a court "cannot definitely say how long is too long." *Barker v. Wingo*, 407 U.S. 514, 521 (1972).[16] Under the circumstances, this Court

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[15] The rational-basis test applies because the due-process right here involves neither fundamental rights nor protected classes. *Id.* at 313.

[16] *Amicus* EFELDF thus submits that this Court should not set *any* timeline here, but the Ninth Circuit's rigid six-month

must reject Aliens' request to promulgate a constitutional rule in favor of those with no right to be here in the first place.

1. The six-month trigger does not apply to the Arriving Class of aliens.

Although this Court has not recently addressed the detention rights of non-criminal aliens like the Arriving Class, that subclass faces the same result as the Mandatory Class. In *Mezei*, 345 U.S. at 215, this Court held that "temporary harborage" such as detaining an alien at Ellis Island in lieu of rejecting him at the border was "an act of legislative grace" that "bestows no additional rights" on the alien. *Amicus* EFELDF respectfully submits that this Court must hold to the rule established in *Mezei* and its progeny.

Aliens claim that the Arriving Class "have a right that Congress has afforded them to be here while their asylum claim is pending." Alien Suppl. Br. at 10. But Aliens cannot cherry-pick their rights: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned," *Mezei*, 345 U.S. at 212 (interior quotations omitted). Aliens cannot take the right to be here – detained, unless released by discretion – and then pare away detention via the Due Process Clause. The right that is afforded them is the right that they get.[17]

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deadline "would require this Court to engage in legislative or rulemaking activity," *id.* at 523, which would be inappropriate here. *See* Section I.E, *supra* (no basis for declaratory relief).

[17] Of course, under *Zadvydas*, detention must be in furtherance of removal proceedings and not punishment, but there is no allegation that the detentions here are punitive in that sense.

Similarly, Aliens reject the Government's reliance on the "deferential standard" based on "facially legitimate and bona fide" justifications as resting on admission, not on detention. *Compare* Aliens Suppl. Br. at 14 *with Fiallo ex rel. Rodriguez v. Bell*, 430 U.S. 787, 794-95 (1977). But as to the Arriving Class, this *is* an admission case.

As this Court has recognized, Congress found that "'aliens who enter or remain in the United States in violation of our law are effectively taking immigration opportunities that might otherwise be extended to others.'" *Demore*, 538 U.S. at 518 (*quoting* S. Rep. No. 104-249, at 7 (1996)). Congress plausibly might have viewed this as a basis for detaining the Arriving Class members until their immigration process resolved.

2. The six-month trigger does not apply to the Mandatory Class of aliens.

With regard to the Mandatory Class, this Court has already held that the "justifiabl[e] concern[] that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers" entitled Congress to "require that persons such as [the LPR there] be detained for the brief period necessary for their removal proceedings." *Demore*, 538 U.S. at 513. Significantly, "Congress adopted this provision against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens." *Id.* at 518 (citing legislative record). It would be remarkable for this Court to second-guess Congress on this issue, given the plenary authority that Congress possesses in this field. *Mandel*, 408 U.S. at 766 (recognizing "Congress' plenary power to make rules for the

admission of aliens and to exclude those who possess those characteristics which Congress has forbidden") (interior quotations omitted). There is no legitimate basis for this Court to interject itself into this area of congressional authority now.

B. The Constitution does not support the Ninth Circuit's procedural demands.

If it reaches the merits, this Court should not extend the procedural rules that the Ninth Circuit purports to have written into the Constitution.

1. The Government does not bear the burden of proof on flight risk or danger to the community.

The lower courts' injunction places the burden of proof[18] on the Government for flight risk and danger to the community, which is counter to both the history of immigration issues in this Court and the default common-law rule placing the burden of proof on the movant (here, the detainee seeking bail, contrary to the Government's desire to continue to hold that detainee). Both reasons compel this Court to reverse the Ninth Circuit on the burden of proof, even if the Court upholds the injunction otherwise.

First, immigration law supports retaining the burden of proof with the immigrant who seeks bail. In *Zadvydas*, the petitioner bore the burden, which this Court accepted. 533 U.S. at 683, 692. Similarly, in *Carlson v. Landon*, 342 U.S. 524, 538 (1952), the Court allowed the Government to hold aliens without

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[18] The term "burden of proof" encompasses both the burden of persuasion and the burden of production. *Schaffer v. Weast*, 546 U.S. 49, 56 (2005).

bail, pending deportation, based on *systemic* criteria under the statute, without an individualized determination. As *Demore* explains, the Government "could deny bail to the detainees by reference to the legislative scheme even without any finding of flight risk." 538 U.S. at 524 (interior quotations omitted). To move the burden of proof to the Government would require this Court to reverse these decisions and that history, which would be difficult to justify against the plenary authority that Congress and its Executive-Branch delegates enjoy here.

Second, the common-law default is for the plaintiff or movant in civil litigation to bear the burden of proof when the statute is otherwise silent. *Schaffer*, 546 U.S. at 56. Even Aliens do not ask this Court to hold them *entitled* to release. As such, Aliens are the party seeking relief, and the default rule places the burden on them.

2. If the government bore the burden of proof, the quantum of proof would not be clear and convincing evidence.

In addition to requiring periodic hearings at which the Government bears the burden of proof, the lower courts' injunction requires the Government to make its flight-risk and community-danger showings by clear and convincing evidence. Because this is a rational-basis context in which Aliens have no right to release, Section II.A, *supra*, *amicus* EFELDF respectfully submits that there is no basis for this Court to elevate the showing that the Government must make, even assuming *arguendo* that the Government bears the burden at all. *See* Section II.B.1, *supra*. Processing

immigrants is a core function of the Executive Branch, as is defending the border. *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *Zadvydas*, 533 U.S. at 700. There is no good reason – much less authority – for federal courts to stand in the way.

3. The Constitution does not compel new hearings, automatically, every six months, without material change to a detainee's circumstances.

In addition to the other procedural advantages that they seek, Aliens also asked the lower courts to ensure that detention time would weigh in the bail analysis, even if not caused by the Government. *Amicus* EFELDF respectfully submits that, even if Aliens are right that lengthy proceedings currently correlate with meritorious cases and aliens who would not abscond, lest they lose their meritorious case, Transcript, at 52:9-19, adopting the injunction that Aliens propose would likely trigger expanded legal activity on by detainees, without the same alleged level of correlation with merit: if the system values delay for detainees, then detainees will introduce more delay. At the very least, it is clear under the rational-basis test that reviewing courts must weigh not only the bases on which Congress *acted*, but also those on which it *plausibly may have acted*. *Beach Communications*, 508 U.S. at 313; *Lehnhausen*, 410 U.S. at 364. Under that test, had Congress considered the issue, Congress reasonably could have concluded that counting delay to detainees' benefit would lead to more delay in detainee proceedings; Congress could plausibly have rejected Aliens' proposal to avoid the increased delay that the proposal likely would cause.

While that would be reason enough to reject this facet of the lower courts' injunction, *amicus* EFELDF notes that the time for seeking judicial review of the bail-hearing regulation, 8 C.F.R. §1003.19(e), has run. 28 U.S.C. §2401(a). Normally, a party like Aliens who seeks to invalidate a rule based on criteria not raised during notice-and-comment and outside the statute of limitations for judicial review must first petition the agency to amend or repeal its rule in light of the new information (*e.g.*, Aliens' theories about the length of the detention correlating with meritorious cases and a preference for intensive supervision). *See* 5 U.S.C. §553(e); *Auer v. Robbins*, 519 U.S. 452, 459 (1997); *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S.Ct. 1378, 1389 (2015) (Breyer, J., concurring in part and concurring in the judgment). *Amicus* EFELDF is not aware that Aliens have established an entitlement to evade the normal perquisites for systemic review of agency rules on this point.

CONCLUSION

The decision of the Ninth Circuit should be reversed.

February 10, 2017

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v.

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Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are 43 scholars and researchers in the fields of sociology, criminology, anthropology, psychology, geography, public health, medicine, Latin American studies, and law, whose work relates to incarceration and detention, migrant populations, and the effect of U.S. immigration detention and removal policies on migrant populations. A full list of *amici curiae*—who join this brief as individuals, not as representatives of any institutions with which they are affiliated—is set forth in the Appendix to this brief.

At issue in this case is whether the Ninth Circuit properly affirmed the permanent injunction requiring, *inter alia*, rigorous bond hearings for all class member immigrant detainees who have been detained by the government for longer than six months pursuant to one of the general immigration detention statutes (i.e., 8 U.S.C. §§ 1226(a), 1226(c), 1225(b)). The objective of the *amici curiae* in this brief is to provide the Court with an empirically grounded understanding of the scope of prolonged detention; the distinctive individual, familial, and societal harms it poses; and the relationship between individualized bond hearings and rates of absconding and recidivism. *Amici* are uniquely positioned to

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[1] The parties have consented to the filing of this *amicus* brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

address these issues, which are critical to an informed resolution of the questions presented.

INTRODUCTION

Social science can shed light on empirical questions about the U.S. immigration detention system that are crucial to resolving this case. *Amici* will address the following three questions:

1. Is immigration detention in fact short-term in the "vast majority of cases," as this Court concluded regarding mandatory detention in *Demore v. Kim*, 538 U.S. 510, 530 (2003)?

2. Are there distinctive individual, familial, and societal harms associated with prolonged immigration detention?

3. What does the contemporary research show regarding the relationship between the provision of immigration bond hearings and rates of absconding and recidivism?

When this Court considered mandatory immigration detention in *Demore v. Kim*, it relied on data that the government recently acknowledged was erroneous.[2] The Court also relied on research on absconding and recidivism that is now out of date. We offer this *amicus* brief to provide the Court with additional research and data on each of these ques-

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[2] *See* Letter from Ian Heath Gershengorn, Acting Solicitor Gen., to Hon. Scott S. Harris, Clerk, Supreme Court 1-3 (Aug. 26, 2016), *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491).

tions. This Court's decisions have frequently relied on such social science research. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015); *Miller v. Alabama*, 132 S. Ct. 2455, 2465 (2012); *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483, 494 (1954).

In summary, the answers to the above questions are as follows:

1. While the overwhelming majority of immigrants detained pending removal proceedings are held for less than six months, prolonged detention[3] disproportionately affects a substantial minority of detainees with strong legal defenses to deportation, including strong asylum claims. These individuals have uniquely high success rates in removal proceedings. *See* Part I.

2. The practice of detaining immigrants longer than six months without an individualized bond hearing inflicts significant harms on detainees, their families, and society at large. *See* Parts II-IV. Prolonged detention exacerbates the physical, mental, societal, and economic harms of transitory detention, and presents unique harms and risks of its own. Immigrants held in prolonged detention suffer physically and psychologically from substandard medical and mental health care, isolation, and increased risk of physical and sexual assault. *See* Parts II.A-B. Detainees' financial and legal interests are

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[3] For purposes of this brief, "prolonged" detention and "long-term" detention are defined as detention lasting longer than six months. *Accord Rodriguez v. Robbins*, 804 F.3d 1060, 1065 (9th Cir. 2015).

also harmed as a result of long-term detention. *See* Parts II.C-D. Beyond these individualized harms, prolonged detention destabilizes families and communities. It also harms society, causing lasting harm to a generation of children impacted by their family members' prolonged detention and costing taxpayers millions of dollars. *See* Parts III-IV.

3. The contemporary research demonstrates that providing detainees with bond hearings does not undermine immigration enforcement. To the contrary, in FY 2015, 86% of individuals released from detention by an Immigration Judge showed up for their court hearing. *See* Part V.A. Additionally, as of May, 2014, ICE reported a recidivism rate of less than 3% for individuals with criminal records who were released from ICE custody in FY2013. *See* Part V.B. The data show that releasing immigrants under appropriate conditions of supervision—as required by the Ninth Circuit in this case—increases appearance rates and reduces recidivism even further. Immigrants released on bond who are subject to supervision return for their hearings 94-99% of the time, while less than 1% were subsequently arrested for alleged criminal activity. *See* Part V.

ARGUMENT

I. Prolonged Detention Is a Widespread Problem for a Limited Subset of Immigrants With Strong Defenses to Deportation.

Social science data reveals that detainees subject to prolonged detention are also the ones most likely

to prevail on their claims to remain in this country. In the case at hand, the record shows that class members were *five times* more likely to win their cases than the general detainee population—35% compared to 7%. J.A. 122, tbl. 35. This is consistent with recent empirical research, which shows that detainees who had legal representation had both the longest case durations and the greatest rate of success.[4] Represented detainees had an *average* case duration of 314 days and a 47% rate of relief.[5] The correlation between length of detention and meritorious defenses is particularly striking in two categories of detainees—those detained pursuant to §1226(c) and asylum seekers detained pursuant to §1225(b).

A. Prolonged Detention Impacts Immigrants Detained Pursuant to 8 U.S.C. §1226(c) With Strong Legal Defenses to Deportation.

In *Demore v. Kim*, the Court stated that "the detention at stake under §1226(c) lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal." 538 U.S. 510, 530 (2003). As previously noted, these numbers were, in fact, mistaken at the time.[6]

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[4] Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 32 fig. 6 (2015).

[5] *Id.* at 65, Table 6.

[6] *See supra* note 2.

Now the Court has the benefit of additional data and research reflecting that, while most immigrants detained pursuant to §1226(c) do spend a brief amount of time in detention, for the significant number that pursue substantial defenses to deportation, the length of detention is markedly longer.

In August 2016, the government made public statistics on the duration of removal cases involving immigrants detained under §1226(c).[7] In FY2015, roughly 11,000 such removal cases were completed without an appeal to the Board of Immigration Appeals. Of these, 941 (8.5%) took over six months to resolve. There were an additional 1,220 cases in which an appeal was filed. Of these, 866 (71%) took more than six months for a decision to issue, and the *average* time from case initiation until the appeal decision was 313 days. Thus, while it is true that the majority of all respondents detained pursuant to §1226(c) have their removal cases resolved in under six months, the number of cases that take longer—in FY2015, 1,807—is significant.

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[7] Office of Planning, Analysis, & Statistics, Exec. Office for Immigration Review, *Certain Criminal Charge Completions Statistics* (2016), http://tinyurl.com/gngrzqt. The statistics do not, in fact, line up precisely with immigrants subject to mandatory detention under §1226(c). The government provides two sets of charts, with and without one specific charge of removability, §237(a)(2)(A)(i). This charge is complicated to classify because it encompasses both mandatory and discretionary detainees, depending on the length of the individual's criminal sentence. There is no data on the breakdown of this charge, but the resulting uncertainty is modest: for example, the 941 figure for cases with no appeal filed that took more than six months to resolve is an undercount by some fraction of 43 detainees.

The individuals subject to prolonged detention under §1226(c) were also the most likely to prevail in their removal proceedings. While class members in general were five times more likely to win their cases than the general detainee population, J.A. 122, tbl. 35, those detained pursuant to §1226(c) had even higher rates of success: 38% of this subclass obtained relief from deportation, as compared to 7% in the general detainee population. J.A. 122, tbl. 35; 135, tbl. 38; App. 34a.

B. Prolonged Detention Impacts Asylum Seekers Initially Detained Pursuant to 8 U.S.C. §1225(b), the Large Majority of Whom Win Their Asylum Claims.

The Court in *Demore* did not consider the population of immigrants who request asylum at the border, and therefore are originally detained pursuant to §1225(b). Only a small, but significant, minority of arriving noncitizens—namely, those who are detained for six months or longer pending removal proceedings—receive a bond hearing under the Ninth Circuit's ruling.

The large majority of noncitizens apprehended at or near the border are immediately removed from the country by an immigration officer through the expedited removal system, without ever seeing an Immigration Judge. In 2013, the most recent year for which data is publicly available, 193,032 individuals were processed through expedited removal.[8] This

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[8] John F. Simanski, U.S. Dep't of Homeland Sec., Annual Report: Immigration Enf't Actions: 2013 5 (Sept. 2014).

number represents 44% of total removals for the year and 82% of ICE removals at the border.[9]

At the border, only people who are not subject to expedited removal—that is, asylum seekers who pass the credible fear screening and individuals with facially valid documents who fail to establish their admissibility—are referred for removal proceedings.[10] In FY 2015, the government conducted over 11,000 credible fear screenings at ports of entry, of which roughly 9,000 asylum-seekers passed.[11] Of these, ICE has markedly increased the proportion who are detained, from 49% in 2010 to 84% in 2014.[12] Assuming the same proportions in FY2015, ICE detained approximately 7,500 asylum seekers who were arriving aliens, some of whom would remain detained for over six months.

A much greater number of asylum-seekers pass credible fear screening through the "inland" process,

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[9] U.S. Immigration and Customs Enf't, FY 2015 ICE Immigration Removals, http://tinyurl.com/hmynlsb (reporting 235,093 border removals in FY 2013, which are defined as individuals removed by ICE who are "apprehended by a CBP officer or agent while attempting to illicitly enter the United States at or between the ports of entry").

[10] 8 U.S.C. §§1225(b)(1)(A)(i)-(ii), (b)(2)(A).

[11] U.S. Citizenship and Immigration Servs., Credible Fear Workload Report Summary 3 (Sept. 2015), http://tinyurl.com/j5ne9wl.

[12] Human Rights First, *Lifeline on Lockdown: Increased U.S. Det. of Asylum Seekers* 11 & n.13 (July 2016). The government data on what subset of these asylum-seekers remain detained for more than six months has been difficult to obtain and analyze. *Id.*

meaning they are apprehended in the interior of the country, not at the border, and then receive a credible fear interview. In FY2015, the government conducted over 30,000 such "inland" credible fear screenings, and over 24,000 asylum-seekers passed.[13] It is uncontested that these individuals receive a bond hearing. *See Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005).

If the statutes were read to foreclose individualized bond hearings for the subpopulation of arriving asylum seekers, the parole system would be their only means of seeking release from detention. The limited research available on the parole system for asylum-seekers depicts a system that is unpredictable and nontransparent. In 2012, ICE granted parole to 80% of arriving asylum seekers who passed their credible fear interview.[14] In 2015, ICE granted parole to only 47% of such persons—even though the criteria for release did not change.[15] Attorney reports that ICE denied parole despite ample evidence demonstrating a lack of flight risk or security risk heighten concerns about whether the parole guidelines are uniformly applied.[16]

Subjecting arriving asylum-seekers to prolonged detention warrants careful consideration for two reasons. First, as detailed in Part II.B, *infra*, asy-

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[13] U.S. Citizenship and Immigration Services, Credible Fear Workload Report Summary, *supra* note 11.

[14] *Lifeline on Lockdown*, *supra* note 12, at 13.

[15] *Id.*

[16] *Id.*

lum-seekers face particular harms from prolonged detention given their recent experiences of trauma in the countries from which they fled. Second, this subclass of detainees is particularly likely to prevail in contesting their deportation. Indeed, 97% of the subclass members in this case applied for asylum, and two-thirds obtained relief. J.A. 98, tbl. 28; J.A. 135, tbl. 38.

II. Prolonged Detention Causes Distinctive and Irreparable Harms to Detainees.

While detention for any length of time is detrimental, prolonged detention results in additional, distinctive harms that are particularly severe, and often irreparable. In particular, individuals subject to prolonged detention suffer four types of harms—physical, psychological, economic, and legal—that differ in degree and kind from those suffered by short-term detainees.

A. Physical Harms of Prolonged Detention.

Extended detention exacerbates a whole range of risks to the health and safety of immigrant detainees. Long-term detainees suffer from insufficient medical care, sexual assault, the excessive use of solitary confinement, and generally poor conditions that take an increasing toll the longer one remains in custody.

Insufficient Medical Care. Numerous studies and reports have documented insufficient medical care in immigration detention facilities. A 2009 government investigation led by Department of Home-

land Security ("DHS") Special Advisor Dr. Dora Schriro identified, among other concerns, systematic failures to provide adequate medical care in immigration detention facilities, and a wide disparity in the availability and quality of care between facilities.[17] In response to the Schriro Report, the government in 2009 announced an initiative to improve accountability and safety in detention facilities.[18]

In the seven years since this announcement, however, many of the problems highlighted by the Schriro Report continue.[19] From October 2003 through September 2016, ICE has acknowledged the death in custody of 163 detainees.[20] One review of the medical records of 18 detainees who died between 2012 and 2015 concluded that "substandard medical care and violations of applicable detention

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[17] Dora Schriro, U.S. Immigration & Customs Enf't, *Immigration Det. Overview and Recommendations* 25 (2009).

[18] *See* Press Release, U.S. Immigration & Customs Enf't, Sec'y Napolitano & ICE Assistant Sec'y Morton Announce New Immigration Det. Reform Initiatives (Oct. 6, 2009).

[19] *See, e.g.*, Human Rights First, *Jails and Jumpsuits: Transforming the U.S. Immigration Det. Sys. – A Two-Year Review* 25 (2011); Detention Watch Network, *Expose and Close: One Year Later: The Absence of Accountability in Immigration Det.* (2013). *See also* Tanya Golash-Boza, *Immigration Nation: Raids, Dets., and Deportations in Post-9/11 America*, 8 Soc'ys Without Borders 313, 313 (2012); Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Det.*, 45 Harv. C.R-C.L. L. Rev. 601, 602-03, 622 (2010).

[20] U.S. Immigration & Customs Enf't, *List of Deaths in ICE Custody*, http://tinyurl.com/jq2pzo9.

standards . . . probably contributed to the deaths of 7 of the 18 detainees."[21]

These conditions are unlikely to improve any time soon: a February 2016 Government Accountability Office (GAO) audit of ICE's management and oversight of immigration detention facility standards concluded that ICE still lacks adequate processes for tracking and addressing complaints of inadequate medical treatment.[22]

Increased Risk of Sexual Abuse and Assault. Prolonged detention also increases the risk of sexual abuse and assault. Incidents of sexual abuse in the detention system are well documented.[23] In 2009, the National Prison Rape Elimination Commission found that, "[a]s a group, immigration detainees are

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[21] Human Rights Watch, *US: Deaths in Immigration Det.* (July 7, 2016); *see also* ACLU, *Fatal Neglect: How ICE Ignores Deaths In Det.* 3 (2016) (concluding that "[i]n nearly half of the death reviews produced by ICE, the documentation suggests that failure to comply with ICE medical standards contributed to deaths"); Office of Det. Oversight, U.S. Dep't of Homeland Sec., Compliance Inspection of Adelanto Correctional Facility 2 (2012) (finding "egregious errors" by medical staff led to Dominguez Valdivia's death).

[22] U.S. Gov't Accountability Office, *GAO-16-231, Report to the Ranking Member, Committee on Homeland Sec., House of Representatives: Immigration Det.: Additional Actions Needed to Strengthen Mgmt. and Oversight of Detainee Medical Care* (Feb. 2016).

[23] *See, e.g.*, David Kaiser & Lovisa Stannow, *Immigrant Detainees: The New Sex Abuse Crisis*, NYR Daily (Nov. 23, 2011), http://tinyurl.com/zsabv4l; Human Rights Watch, *Detained and At Risk: Sexual Abuse and Harassment in United States Immigration Det.* (Aug. 25, 2010).

especially vulnerable to sexual abuse and its effects while detained due to social, cultural, and language isolation; poor understanding of U.S. culture and the subculture of U.S. prisons; and the often traumatic experiences they have endured in their culture of origin."[24] These risks are even more acute for certain especially vulnerable subpopulations, including transgendered detainees.[25]

In 2013, the GAO conducted a study on sexual abuse and sexual assault in immigration detention facilities and found that ICE did not maintain complete records regarding sexual abuse and assault incidents.[26] The report substantiated 15 incidents of sexual assault in ICE facilities from October 2009 through March 2013[27]—which is almost certainly a gross understatement of actual incidents given the lack of documentation. Exacerbating the failures of record-keeping, up to 40% of sexual abuse and as-

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[24] Nat'l Prison Rape Elimination Comm'n, *National Prison Rape Elimination Comm'n Report* 176 (2009) (citations omitted).

[25] Human Rights Watch, "*Do You See How Much I'm Suffering Here?": Abuse Against Transgender Women In US Immigration Det.* (Mar. 23, 2016) ("[T]hree out of fifteen substantiated incidents of sexual assault in US immigration detention facilities involved transgender women.").

[26] U.S. Gov't Accountability Office, *GAO-14-38, Immigration Det.: Additional Actions Could Strengthen DHS Efforts to Address Sexual Abuse* 25 (2013).

[27] *Id.* at 60-62.

sault allegations were not reported to ICE headquarters as required by agency procedures.[28]

In 2014, nearly a decade after passage of the Prison Rape Elimination Act (PREA), DHS issued regulations implementing the Act's protections against sexual abuse in custody.[29] The regulations, however, do not automatically apply to facilities operated by local sheriffs or private contractors—which together house the vast majority of ICE detainees. The PREA regulations will not be enforced at these facilities until the underlying detention contracts are renegotiated.[30] As a result, it may be years before long-term detainees will be fully covered by the PREA regulations. Informal barriers to preventing and reporting sexual abuse in DHS facilities—such as retaliatory loss of privileges—may also allow abuse to continue to remain hidden.[31]

Frequent Misuse of Solitary Confinement. Another serious risk to the health and safety of long-term detainees is the improper use of solitary confinement, which ICE typically refers to as "segregation." In 2013, ICE released data showing that, on

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[28] *Id.* at 1, 19.

[29] Standards To Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities, 79 Fed. Reg. 13100 (Mar. 7, 2014) (codified at 6 C.F.R. pt. 115).

[30] 79 Fed. Reg. at 13104 n.6.

[31] Erika Eichelberger, *Watchdog: Feds Are Muzzling Us for Reporting Alleged Immigrant Detainee Sex Abuse*, Mother Jones (Mar. 19, 2014, 10:02 AM), http://www.motherjones.com/politics/2014/03/ice-sexual-abuse-immigrant-detention-oversight.

average, 300 immigrants are held in solitary confinement at the 50 largest detention facilities on any given day.[32] Five years earlier, the Schriro Report raised concerns about the use of segregation "to detain special populations whose unique medical, mental health, and protective custody requirements cannot be accommodated in general population housing."[33] Segregation is also overused for disciplinary purposes. A recent examination of solitary confinement of immigrant detainees in the Essex County Correctional Facility found that the facility overused solitary confinement by, among other things, "stacking" disciplinary charges against detainees (charging a detainee with multiple offenses for a single incident) and imposing solitary confinement during prehearing detention before any finding of misconduct.[34]

It is well established that this type of isolation exacerbates physical and mental health problems.[35]

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[32] Ian Urbina & Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. Times, Mar. 24, 2013, at A1.

[33] See Schriro, *supra* note 17, at 21; Nat'l Immigrant Justice Ctr. & Physicians for Human Rights, *Invisible in Isolation: The Use of Segregation and Solitary Confinement in Immigration Det.* 4 (2012) (documenting similar findings on a national scale).

[34] N.J. Advocates for Immigrant Detainees, *Isolated In Essex: Punishing Immigrants Through Solitary Confinement* 23-24 (June 2016).

[35] Juan E. Mendez (Special Rapporteur on Torture & Other Cruel, Inhuman or Degrading Treatment of Punishment), *Interim Rep. of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/68/295 (Aug. 9, 2013); Craig Haney, *Mental Health Issues in Long-Term Solitary and*

Research demonstrates that solitary confinement can lead to a combination of symptoms referred to as "prison psychosis," including hypersensitivity to external stimuli, hallucinations, panic attacks, obsessive thoughts, paranoia, and lack of impulse control.[36] Suicide and self-harm are also more common in solitary confinement than in general prison populations.[37]

In 2013, ICE acknowledged the problem, establishing procedures for reviewing detainees placed in segregation and outlining stricter requirements for disciplinary segregation.[38] The revised standards provide that disciplinary segregation may be imposed only after a hearing and a determination of a "serious violation" of a facility rule. The revised standards suffer from compliance problems, howev-

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"Supermax" Confinement, 49 Crime & Delinquency 124, 124-56 (2003).

[36] See Nat'l Immigrant Justice Ctr. & Physicians for Human Rights, *Invisible in Isolation*, *supra* note 33, at 12.

[37] Vera Inst. of Justice, *Solitary Confinement: Common Misconceptions and Emerging Safe Alts.*, 17-18 (May 2015) (reporting that 69% of suicides among incarcerated individuals in California in 2006 took place in segregated housing); *see also* "*The Strange Death of Jose de Jesus*," National Public Radio Latino USA (July 15, 2006), http://tinyurl.com/zdqv8wr (chronicling suicide of detainee in isolation who was taken off suicide watch 24 hours after prior suicide attempt); *see also Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring) ("[R]esearch still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price.").

[38] U.S. Immigration & Customs Enf't, 11065.1, Review of the Use of Segregation for ICE Detainees (2013).

er, including that individual facilities operate under contracts that do not necessarily require implementation of the updated procedures.[39]

B. Psychological Harms of Long-Term Detention.

Immigrants in detention for prolonged periods suffer severe and lasting psychological harms. The very fact that the detention is prolonged takes a serious toll on the mental health of detainees. All detainees face uncertainty about when or whether they will be released, which frequently leads to high rates of anxiety, despair, and depression.[40] During prolonged detention, these feelings become more pronounced and often manifest themselves as diagnosable mental health conditions.[41] One study concluded that detention without a definite endpoint—the characteristic of all prolonged detention for immigrant detainees—results in "physical, social and emotional problems [that] continue to plague individuals long after their release . . . ."[42]

The mental toll of detention is exacerbated in facilities that have physical infrastructures and program offerings generally designed for inmates who

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[39] John Marshall Law School, *U.S. Immigration and Customs Enf'ts New Directive on Segregation: Why We Need Further Protections* 7 (2014).

[40] *See* Physicians for Human Rights, *Punishment Before Justice: Indefinite Det. in the US* 11 (2011).

[41] *Id.* at 16.

[42] *Id.* at 17.

are expected to remain in custody for a year or less.[43] Many detainees have described being detained for prolonged periods under these conditions as difficult to bear.[44]

Nor are detention facilities equipped to provide quality mental health care to long-term detainees. A 2011 DHS Inspector General report found that the ICE Health Service Corps, which provides direct care and arranges for outside health care services to detainees, staffed "only 18 of the nearly 250 detention centers nationwide and has limited oversight and monitoring for mental health cases across immigration detention centers."[45] This government report raised serious concerns about ICE's capacity to provide detainees with proper treatment.[46] The high

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[43] Physicians for Human Rights & Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Det. for Asylum Seekers* 10-14, 126 (2003) (immigrant detainees "reported feeling degraded and being treated like criminals" and described the negative impact this treatment had on their mental health).

[44] *Id.*; *see also* Women's Refugee Comm'n, *Politicized Neglect: A Report from Etowah County Det. Ctr.* 5 (2012).

[45] Office of Inspector Gen., U.S. Dep't of Homeland Sec., *Mgmt. of Mental Health Cases in Immigration Det.* 1 (2011).

[46] *Id.* at 1. This concern is even greater for detainees with pre-existing mentally illnesses who often either go untreated or receive "one size fits all" medication. *See id.* at 5 (noting that the Health Service Corps lacks a mechanism for screening and tracking mental health conditions of individual detainees).

rate of suicides among detainees underscores the urgent nature of these concerns.[47]

While all long-term detainees face the prospect of lasting psychological harm,[48] asylum-seekers and other survivors of recent violence and trauma confront particularly severe mental health challenges. Asylum seekers are often in an especially vulnerable and fragile mental state, as many arrive having escaped rape, torture, or other forms of trauma, and having left their homes and families behind.[49] One recent report estimated that in less than three years, from October 2010 to February 2013, the United States detained approximately 6,000 torture survi-

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[47] *See* Alex Friedmann, *32 Deaths at CCA-operated Immigration Det. Facilities Include at Least 7 Suicides*, Prison Legal News (June 20, 2015), http://tinyurl.com/jfb8bde.

[48] *See, e.g.*, Golash-Boza, *supra* note 19, at 65 (recounting how substandard medical care during prolonged detention resulted in an immigrant suffering serious health problems); Heeren, *supra* note 19, at 601-03, 622 (same).

[49] One study found that 74% of detained asylum seekers had been tortured before arriving to the U.S., 67% had been imprisoned in their country of origin, 59% reported a murder of a family member or friend, and 26% reported having been sexually assaulted prior to arrival. Allen Keller et al., *Mental Health of Detained Asylum Seekers*, 362 Lancet 1721, 1722 (2003); *see also* Ctr. for Victims of Torture et al., *Tortured & Detained: Survivor Stories of U.S. Immigration Det.* 5 (2013) [hereinafter *Tortured & Detained*]; *see also* Nina Rabin, *At the Border Between Public and Private: U.S. Immigration Policy for Victims of Domestic Violence*, 7 Law & Ethics Hum. Rts. 109, 139 (2013) (documenting 34 women with domestic violence-based asylum claims held in Eloy Detention Center in 2010-2011 for 6-22 months).

vors who were seeking asylum.[50] The mental health issues associated with this population are striking. A study of detained asylum-seekers found that 77% showed clinically significant symptoms of anxiety, 86% exhibited symptoms of depression, and 50% suffered from symptoms of Post-Traumatic Stress Disorder ("PTSD").[51] Of these detainees, 26% reported thoughts of suicide while in detention, and just under 3% reported attempting suicide.[52] In turn, PTSD symptoms render such individuals more susceptible to sexual victimization and less likely to report it.[53] Asylum-seekers are thus both more susceptible to the harms of prolonged detention and more likely to be scarred by them.

C. Economic Harms of Prolonged Detention.

As this Court has observed, "[t]he time spent in jail awaiting trial . . . often means loss of a job; it disrupts family life; and it enforces idleness . . . . The time spent in jail is simply dead time . . . ." *Barker v. Wingo*, 407 U.S. 514, 532-33 (1972). The "dead time" of long-term detention affects lawful permanent residents alo[illegible] with other immigrants legally eligible to

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[50] *Tortured & Detained*, *supra* note 49, at 5.

[51] Keller et al., *supra* note 49, at 1722.

[52] *Id.* Conversely, detainees who exhibited symptoms of anxiety, depression, and PTSD while detained showed significant improvement after release from detention. *Id.*; *see also Tortured & Detained*, *supra* note 49, at 12.

[53] *See* Nat'l Prison Rape Elimination Comm'n, *supra* note 24, at 178 (citations omitted).

work in the United States.[54] The economic hardship imposed from being unable to work for long periods of time is clear,[55] and is especially pronounced for immigrants, who often are in a precarious financial state even before detention.[56] Immigrants in extended detention almost invariably lose their jobs, and thus income for necessities, including food and shelter for their families. Some also lose their homes through foreclosure.[57] For the few detainees fortunate enough to be able to hire a lawyer, the concurrent inability to work and the assumption of legal expenses compounds the economic harm.[58]

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[54] *See* Constitution Project, *Recommendations for Reforming our Immigration Det. Sys. and Promoting Access to Counsel in Immigration Proceedings* 22 (2009) (noting that lawful permanent residents involved in removal proceedings "may have held long term-jobs in this country"); *see also* U.S. Citizenship & Immigration Servs., *Instructions for I-765, Application for Employment Authorization* 1-6 (2012) (listing classes of aliens temporarily in the United States able to apply for work, including asylees/refugees, certain nationality categories, and others).

[55] *See* Ajay Chaudry et al., The Urban Inst., *Facing Our Future: Children in the Aftermath of Immigration Enf't* 27 (2010) (noting families "generally lose[] a breadwinner" during immigration detention); Human Rights Watch, *Jailing Refugees: Arbitrary Detention of Refugees in the US Who Fail to Adjust to Permanent Resident Status* 36 (2009) (noting that the detention of refugees "results in loss of jobs").

[56] *See* Randy Capps et al., The Urban Inst., *A Profile of the Low-Wage Immigrant Workforce* 5-6 (2003).

[57] *See* Heeren, *supra* note 19, at 622 (immigrant lost his home as a result of three-year long detention); *see also* Chaudry et al., *supra* note 55, at ix, 29-31.

[58] *See Nat'l Ctr. for Immigrants Rights, Inc. v. INS*, 743 F.2d 1365, 1369 (9th Cir. 1984) (noting that the "hardship from

And, an individual's ability to work is hindered not only during detention, but also after release because of the stigma associated with detention. Employers may avoid hiring formerly detained immigrants because they are afraid of administrative complications with ICE.[59]

D. Legal Harms of Prolonged Detention.

Prolonged detention inflicts substantial harm on an individual's access to and exercise of legal rights, including hindrance of the "ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Barker*, 407 U.S. at 533. The vast majority of detainees—86% nationally—lack counsel in immigration proceedings.[60] Long-term detainees are at a distinct disadvantage as many are held in remote locations far from legal services and have limited ability to seek or pay for representation.[61]

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being unable to work . . . to pay for legal representation is beyond question").

[59] *See* Chaudry et al., *supra* note 55, at 28.

[60] *See* Eagly, *supra* note 4; *see also* Separate Representation for Custody and Bond Proceedings, 79 Fed. Reg. 55659, 55659-60 (proposed Sept. 17, 2014) (to be codified at 8 C.F.R. pt. 1003) ("Of the 265,708 initial case completions for detained aliens from FY 2011 to FY 2013, 210,633 aliens, or 79 percent, were unrepresented.").

[61] *See Jails and Jumpsuits*, *supra* note 19, at 31 (almost 40% of ICE detention bed space is located more than 60 miles from an urban center); Peter L. Markowitz et al., Steering Comm. of the N.Y. Immigrant Representation Study Report, *Accessing Justice: The Availability And Adequacy of Counsel In Removal Proceedings*, 33 Cardozo L. Rev. 357, 369 (2011)

Having a lawyer is critical. A recent study documented the dramatic difference a lawyer makes: detained immigrants with counsel obtained a successful outcome[62] in 21% of cases, ten-and-a-half times greater than the 2% rate for their *pro se* counterparts.[63] A nationwide study focused specifically on asylum adjudication concluded that whether an

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(study of detainees in New York concluded that representation rates for detainees transferred out of state were "dismal"); Am. Bar Ass'n, Comm'n on Immigration, *Reforming the Immigration Sys.: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* 5-9 (2010) [hereinafter *Reforming the Immigration System*] (stating that "remote facilities . . . and the practice of transferring detainees from one facility to another often more remote location without notice stand in the way of retaining counsel for many detainees").

[62] A successful outcome refers to the ability to remain in the country, either because the government's charges are terminated (*e.g.*, when the Notice of Action fails to state a valid reason for removal) or because an immigration judge grants relief from removal (*e.g.*, asylum).

[63] Eagly, *supra* note 4, at 50 fig. 14; *see also* Markowitz et al., *Accessing Justice*, *supra* note 61, at 363 (from 2005 to 2011 non-detained immigrants with lawyers had successful outcomes 74% of the time, while detained immigrants without counsel prevailed 3% of the time); Am. Bar Ass'n, Comm'n on Immigration, *Reforming the Immigration Sys.: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* 5-8 (2010) [hereinafter *Reforming the Immigration Sys.*] ("[T]he disparity in outcomes of immigration proceedings depending on whether noncitizens are unrepresented or represented is striking.").

asylum seeker is represented is the single most important factor affecting the outcome of her case.[64]

Irrespective of whether a detainee has legal counsel, the circumstances of long-term detention render effective representation difficult, if not impossible. One major obstacle is the limited access to telephones in most detention facilities.[65] Assuming a detainee is able to locate counsel, the detainee must pay to make phone calls, a cost that many long-term detainees find prohibitive.[66] A broad national survey of detention facilities found that many facilities prohibited private calls between lawyers and their detained clients, and in several cases, even leaving messages was impossible.[67] Mail communication is

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[64] Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 340 (2007) ("Represented asylum seekers were granted asylum at a rate of 45.6%, almost three times as high as the 16.3% grant rate for those without legal counsel."); *see also Reforming the Immigration Sys.*, *supra* note 61, at 5-8.

[65] *See* Nat'l Immigrant Justice Ctr., *Isolated in Det.: Limited Access to Legal Counsel in Immigration Det. Facilities Jeopardizes a Fair Day in Court* 4 (2010) [hereinafter *Isolated in Detention*] (reporting widespread problems with phone access); *see also* U.S. Gov't Accountability Office, *GAO-07-875, Alien Det. Standards: Telephone Access Problems Were Pervasive at Det. Facilities; Other Deficiencies Did Not Show a Pattern of Noncompliance* 15-17 (2007) (discussing deficiencies with phone system).

[66] *See, e.g.*, Ruben Loyo & Carolyn Corrado, N.Y.U. Sch. of Law Immigrant Rights Clinic, *Locked Up But Not Forgotten: Opening Access to Family & Cmty in the Immigration Det. Sys.* 23 (2010).

[67] *Isolated in Detention*, *supra* note 65, at 9.

also slow and costly and an unreliable means of communication for long-term detainees, who are frequently transferred from one facility to another. Between 1998 and 2010, 52% of detainees were transferred at least once, and 46% were moved multiple times.[68] With no reliable mail forwarding, mail intended for detainees is often returned or lost. Furthermore, despite standards requiring access to legal resources, detention facilities often provide inadequate resources, including limited materials in languages other than English.[69]

When detainees struggle to obtain the assistance necessary to mount an effective defense, the result is an overall increase in the total time spent in detention. A study of detainees from 2007 through 2012 showed that, among detainees who sought counsel, nearly 51% of all court adjudication time was incurred due to requests for time to find an attorney.[70]

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[68] *See* Human Rights Watch, *A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States* 1, 17 (2011).

[69] *See* Schriro, *supra* note 17, at 23; Org. of Am. States, Inter-American Comm'n. on Human Rights, *Report on Immigration in the United States: Det. and Due Process* 117 (2010); Nina Rabin, *Unseen Prisoners: Women in Immigration Det. Facilities in Arizona*, 23 Geo. Immigr. L.J. 695, 728 (2009) (finding multiple Arizona detention facilities fail to comply with detention standards providing for access to legal resources like law libraries).

[70] Eagly, *supra* note 4, at 61 fig. 16.

III. Prolonged Detention Harms the Families of Detainees, Including U.S.-Citizen Children.

Prolonged detention adversely affects detainees' families, especially children, many of whom are U.S. citizens.[71] Excluding arriving asylum seekers, more than 60% of class members in this case have at least one U.S.-citizen child. J.A. 554-56 ¶¶ 15-20. Immigrant detainees have minimal contact with their families. Between 1998 and 2010, detained immigrants were transported an average of 370 miles to a detention facility, making regular contact with their children and families virtually impossible.[72] A recent study of visitation in the context of immigration detention found those detained in privately-contracted facilities were even less likely to have visits, suggesting that both restrictive visitation policies and geography undermine detainee access to family visits.[73]

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[71] A joint report by the Migration Policy Institute and Urban Institute recently estimated that parents of U.S. citizen children made up between one-fifth and one-quarter of the 3.7 million immigrants deported between 2003 and 2013. *Health and Social Serv. Needs of U.S.-Citizen Children with Detained or Deported Immigrant Parents* (Sept. 2015) http://tinyurl.com/hxz7; *see also* Seth F. Wessler, *Nearly 250K Deportations of Parents of U.S. Citizens in Just over Two Years*, Colorlines (Dec. 17, 2012, 9:45 AM), http://tinyurl.com/gnv7vye.

[72] Seth Freed Wessler, Applied Research Ctr., *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System* 5 (2011); *see also* Loyo & Corrado, *supra* note 66, at 1, 9.

[73] Caitlin Patler & Nicholas Branic, *Legal Status and Patterns of Family Visitation During Immigration Det.*, 3 Russell Sage Journal of the Social Sciences (forthcoming 2017). *See also*

Children suffer the most acute effects. Increased anxiety, stress, and depression have been documented in children with one or both parents detained.[74] An Urban Institute study found that children whose parents were held in immigration detention for long periods were more likely to exhibit adverse changes in sleeping habits and behavior, including increased anger and withdrawal, as compared with children who were reunited with their parents within a month of apprehension.[75] The harmful effects extend to children's well-being in other areas, including development and academic performance.[76]

Schriro, *supra* note 17, at 23-24; Loyo & Corrado, *supra* note 66, at 12 fig.1; *Jails and Jumpsuits*, *supra* note 19, at 9.

[74] Marjorie S. Zatz & Nancy Rodriguez, *Dreams and Nightmares: Immigration Policy, Youth, and Families* 86 (2015) (summarizing this research); *see also* Health and Social Service Needs of U.S. Citizen Children with Detained or Deported Immigrant Parents (children with detained or deported parents "refused to eat, pulled out their hair, or had persistent stomachaches or headaches. Others turned to more self-destructive outlets such as cutting themselves or abusing substances.").

[75] Chaudry et al., *supra* note 55, at 43. Ten parents in the population tracked by the Urban Institute study were detained up to one month and 18 parents were detained longer than one month. *Id.* at 14.

[76] Kalina Brabeck & Qingwen Xu, *The Impact of Det. and Deportation on Latino Immigrant Children and Families: A Quantitative Exploration*, 32 Hisp. J. of Behav. Sci. 341 (2010). Studies in the context of children of incarcerated parents confirm the negative impacts of parental detention. Todd R. Clear, *Imprisoning Cmtys: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse* 97 (2007) (citing John Hagan et al., *Collateral Consequences of Imprisonment for Children, Communities and Prisoners, in Prisons* 121-162 (Michael Tonry & Joan Petersilia, eds. 1999).

Recent research indicates that immigration detention is often one of multiple factors that combine to make children of undocumented immigrants more prone to behavioral and emotional problems throughout their lives.[77]

For some parents, prolonged detention has resulted in their children being removed from the family entirely and placed in foster care. In 2011, a national research study estimated that at least 5,100 children whose parents had been either detained or deported were living in foster care.[78] In these cases, in addition to being separated from their children, detained parents struggle to meet court mandates set by the child welfare system, including visits and parenting classes.[79] Due to state and federal timelines established to ensure a permanent home for children in government custody, detained parents may lose their parental rights as a result of prolonged detention.[80]

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[77] Kalina Brabeck et al., *The Psychosocial Impact of Det. and Deportation on U.S. Migrant Children and Families*, 84 Am. J. of Orthopsychiatry 495, 498-99 (2013) (summarizing this research); Human Impact Partners, *Family Unity, Family Health: How Family-Focused Immigration Reform Will Mean Better Health for Children and Families* (2013).

[78] Wessler, Applied Research Ctr., *supra* note 72, at 4.

[79] Nina Rabin, *Disappearing Parents: Immigration Enforcement and the Child Welfare Sys.*, 44 Conn. L. Rev. 99, 140 (2011).

[80] *Id.*; *see also* Wessler, Applied Research Ctr., *supra* note 72, at 8; Sarah Rogerson, *Lack of Detained Parents' Access to the Family Justice Sys. and the Unjust Severance of the Parent-Child Relationship*, 47 Family L.Q. 141, 141-72 (2013); Wom-

In 2013, ICE recognized this concern and issued a Parental Rights Interests Directive, establishing procedures for parents in detention with child welfare cases.[81] Until the number of parents subject to prolonged detention drops significantly, however, the directive cannot fully address the scope of challenges facing these families. A recent U.S. Department of Health and Human Services directive notes that child welfare agencies continue to regularly encounter the prolonged detention of parents with children in the child welfare system.[82]

IV. Prolonged Detention Harms Society.

The costs of prolonged detention are staggering. Between FY 1995 and FY 2016, the average daily immigration detention population grew from 7,475 to 32,985.[83] A total of 367,774 individuals were in ICE

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en's Refugee Comm'n, *Torn Apart by Immigration Enf't: Parental Rights and Immigration Det. 10* (2010); Wendy Cervantes & Yali Lincroft, *The Impact of Immigration Enf't on Child Welfare* 6 (2010).

[81] U.S. Immigration & Customs Enf't, *Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities Directive* (Aug. 23, 2013), http://tinyurl.com/j2p755s

[82] Admin. On Children, Youth & Families, U.S. Dep't of Health & Human Servs., ACYF-CB-IM-15-02, *Case Planning and Service Delivery for Families with Parents and Legal Guardians who are Detained or Deported by Immigration Enf't* (Feb. 20, 2015); *see also* Victoria Kline, Instituto para las Mujeres en la Migración, *Where Do We Go From Here? Challenges Facing Transnational Migrant Families Between the US and Mexico* 31-32 (2013).

[83] ACLU, *Shutting Down the Profiteers: Why and How the Dep't of Homeland Sec. Should Stop Using Private Prisons* 7 (Sept. 2016).

custody at some point during FY 2015.[84] To accommodate this extraordinary volume of detainees, DHS requested $2.407 billion in its FY 2016 budget proposal to fund immigrant detention.[85] This amounts to more than $6.5 million per day to detain immigrants, at an estimated daily cost of $158 per detainee.[86]

Conversely, alternatives to detention, identified by the District Court in this case, cost anywhere from 17 cents to 17 dollars a day per individual.[87] The government estimates that, in 2013, the average cost per participant in alternatives to detention was $10.55.[88]

Detaining productive, contributing members of society also imposes opportunity costs. Immigrants, both documented and undocumented, pay property

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[84] TRAC Immigration, *New Data on 637 Det. Facilities Used by ICE in FY2015* (Apr. 12, 2016), http://tinyurl.com/hdjzlgj.

[85] U.S. Dep't of Homeland Sec., *Budget-in-Brief: Fiscal Year 2016* 13 (2014); Nat'l Immigration Forum, The President's FY 2016 Budget Dep't of Homeland Sec. (Feb. 6, 2015), http://tinyurl.com/h4lmo3w.

[86] U.S. Gov't Accountability Office, *GAO-15-26, Alts. to Det.: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness* 9-12, 19 (Nov. 2014).

[87] U.S. Dep't of Homeland Sec., *Congressional Budget Justification: FY 2012, U.S. Immigration and Customs Enf't Salaries and Expenses: Alts. to Det.* 43-45 (2012); *see also* Nat'l Immigration Forum, *The Math of Immigration Det.: Runaway Costs for Immigration Det. Do Not Add Up to Sensible Policies* 11 (2013).

[88] GAO, *Alternatives to Detention*, *supra* note 86.

and sales taxes, and many pay income taxes.[89] A 2010 Institute for Taxation and Economic Policy study found that households headed by unauthorized immigrants contributed approximately $11.2 billion in taxes to state and local governments.[90] This study did not address the separate contributions of immigrants authorized to be in the country. Prolonged detention compromises these substantial revenues.[91]

V. Bond Hearings Do Not Undermine Immigration Enforcement.

Social science research establishes that, for the relatively small number of detainees subject to prolonged detention, the provision of individualized bond hearings does not lead to increased rates of absconding or recidivism. Furthermore, the data available today differs significantly from when the Court considered questions regarding flight risk and recidivism of immigrant detainees in *Demore*.

A. Detainees Released on Bond After an Individualized Bond Hearing Have High Rates of Appearance in Future Court Proceedings.

A recent analysis of EOIR court records over the past 20 years showed an increasing number of de-

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[89] *See* Golash-Boza, *supra* note 19, at 148; Immigration Policy Ctr., *Unauthorized Immigrants Pay Taxes, Too* 1 (2011) [hereinafter *Immigrants Pay Taxes*].

[90] *Immigrants Pay Taxes*, supra note 89, at 3 (considering personal income taxes, property taxes, and sales taxes).

[91] *Id.*

tainees receiving bond hearings, and yet no corresponding increase in absconder rates.[92] Furthermore, analysis of the case outcomes of individuals released on bond by an Immigration Judge showed the overwhelming majority return to court for their removal proceedings.[93] For example, in FY 2015, 86% of individuals released from detention by an Immigration Judge showed up for their hearing.[94]

Given that non-detained removal proceedings take years to resolve, there is not yet a sufficiently robust number of class members released pursuant to bond hearings in this case to analyze rates of absconding. If anything, the evidence suggests that the appearance rates among class members will be even higher than 86%. Immigration Judges who grant releases at bond hearings held pursuant to the Ninth Circuit's decision below are required to consider imposing conditions of supervision.[95] The government's conditional supervision program, called ISAP II (Intensive Supervision Appearance Program), relies on the use of electronic ankle monitors, biometric voice recognition software, unannounced home visits, employer verification, and in-person reporting to super-

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[92] TRAC Immigration, *What Happens When Individuals Are Released On Bond in Immigration Court Proceedings?* (Sept. 14, 2016), http://tinyurl.com/jjbyv64.

[93] *Id.*

[94] *Id.* In addition, the appearance rate of those released by an Immigration Judge is substantially higher than the appearance rate of individuals that ICE itself released from custody: 86% as compared to 76.6%. *Id.*

[95] *Rodriguez*, 804 F.3d at 1087-88.

vise participants.[96] A government-contracted evaluation of this program reported a 99% attendance rate at all EOIR hearings and a 94% attendance rate at final hearings.[97]

Additionally, methodological concerns must be taken into account when considering the government's statistics regarding *in absentia* orders. The government reports that 41% of case completions in FY 2015 were *in absentia* orders "after the alien absconded." Pet. Br. at 22. This statistic is problematic.[98] *In absentia* orders are typically entered after a single failure to appear, while other removal cases are often continued for months or years without disposition. When the volume of removal cases spikes—as it did in 2014—the short-term case completion data following the spike inevitably over-represents the quickly entered *in absentia* orders, while the remainder of removal cases are still pending.

The sole fact of an *in absentia* order also does not, as the government assumes, mean that the alien has permanently absconded. To the contrary, *in absentia* orders are issued after only a single failure to

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[96] U.S. Gov't Accountability Office, *GAO-15-26, Report to Congressional Committees: Alternatives to Detention* 10-11 (Nov. 2014).

[97] *Intensive Supervision Appearance Program II: Contract Year 2013 Annual Report* (BI Incorp. 2013); *see also* J.A. 380; J.A. 564-65 at 112:2-24; J.A. 432-33; *see also* App. 53a-55a.

[98] *See* TRAC Immigration, *What Happens When Individuals Are Released On Bond in Immigration Court Proceedings?*, *supra* note 92, at n.7 (explaining inaccuracies in EOIR's methodology for calculation of the *in absentia* rate).

appear. In some cases, an initial failure to appear arises from a lack of notice of the hearing or ineffective assistance of counsel. Those cases may be subsequently reopened with the alien present, but the *in absentia* order is still counted in the government's statistic.[99]

Finally, the government statistic omits from the equation the substantial number of cases completed through means other than a final hearing, such as prosecutorial discretion or administrative closure. These other methods of case completion currently make up approximately 25% of completions. Factoring in these alternative dispositions, the *in absentia* orders would represent a much smaller percentage of the total annual completions.[100]

B. Detainees Released on Bond Are No More Likely to Engage in Criminal Activities Than the General Population.

Substantial research establishes that immigrant crime rates have long been no greater—and in some instances substantially lower—than the crime rate for citizens.[101] This is consistent with the general

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[99] *Id.*

[100] *Id.*

[101] Walter A. Ewing et al., Am. Immigration Council, *The Criminalization of Immigration in the United States* 2 (July 13, 2015), http://tinyurl.com/jxcv9aq (reviewing data and concluding that "immigrants are less likely to be criminals than the native-born"); Alex Nowrasteh, Cato Institute, *Immigration and Crime—What the Research Says* (July 14, 2015, 11:49 AM), http://tinyurl.com/nmpejag ("With few exceptions, immigrants

observation that, while immigrant populations have steadily grown over the last several years, crime rates in the United States have trended downward.[102] And at least as of May 2014, ICE reported a recidivism rate of less than 3% for the 36,007 individuals with criminal records who were released from ICE custody in FY2013.[103]

The sole empirical basis for the government's assertion that bond hearings will lead to increased recidivism is a newspaper article that analyzed 323 noncitizens released pursuant to *Zadvydas v. Davis*, 533 U.S. 678 (2001). Pet. Br. at 34. But those individuals were not screened before release to determine if they posed a danger or a flight risk.[104] This dataset therefore is not probative of recidivism rates for immigrants who obtain release through an individualized bond hearing.[105]

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are less crime prone than natives or have no effect on crime rates").

[102] Ewing et al., *supra* note 101, at 1.

[103] Office of the Exec. Assoc.. Dir. of Enf't & Removal Operations, U.S. Immigration & Customs Enf't, *Criminal Recidivist Report* 3 (2013).

[104] The referenced individuals were released by ICE pursuant to the Court's decision in *Zadvydas v. Davis* because they had been ordered removed, yet their removal could not be effectuated in the reasonably foreseeable future.

[105] Mark Fleming, National Immigrant Justice Center, *Solicitor General Again Relying on Faulty Data to Justify Indefinite Immigration Det. in* Jennings v. Rodriguez (Oct. 14, 2016), http://tinyurl.com/hj7h2ch.

The recidivism figure in the article also does not distinguish between routine traffic offenses or probation violations and serious crimes.[106] This omission is particularly misleading in light of the fact that the majority of detainees subject to mandatory detention based on prior crimes are not considered to pose high public safety risks. A recent study of ICE's own risk assessments (based on a computerized algorithm that ICE uses in its book-in process to assess public safety and flight risk) showed that ICE classified only 25% of a group of 101 detainees subject to mandatory detention as posing a high risk to public safety.[107] This was roughly the same as the percentage of high risk classifications for detainees subject to non-mandatory detention.[108] Presumably, if these "high risk" detainees were detained for more than six months and received bond hearings, they would be unlikely to secure release in light of the factors that led to their high risk classification.

Finally, as data from the government's supervision programs also demonstrate, alternatives to detention are effective in preventing criminal activity by immigrants released on bond. For instance, in 2011, less than 1% of participants in ISAP were re-

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[106] *Id.*

[107] Robert Koulish, *Using Risk to Assess the Legal Violence of Mandatory Det.*, Laws 2016, 9 (July 5, 2016). Specifically, for those subject to mandatory detention, ICE classified 25% (25 of 101) high risk, 58% (59 of 101) medium risk, and 17% (17 of 101) low risk. For those subject to non-mandatory detention, ICE classified 23% as high public safety risks (59 of 258 cases), and 39% as medium public safety risks (101 of 258 cases).

[108] *Id.*

moved from the program due to arrest by another law enforcement agency. J.A. 449. By employing alternatives to detention, ICE can substantially mitigate recidivism without needlessly prolonging detention.

CONCLUSION

This Court should affirm the Ninth Circuit's decision.

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Supreme Court of the United States

DAVID JENNINGS, *ET AL.*,

Petitioners,

—v.—

ALEJANDRO RODRIGUEZ, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* HUMAN RIGHTS FIRST IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Human Rights First is a non-governmental organization established in 1978 that works to ensure American leadership on human rights globally and compliance domestically with this country's human rights commitments. Human Rights First operates one of the largest programs for *pro bono* legal representation of refugees in the nation, working in partnership with volunteer lawyers at leading law firms to provide legal representation without charge to thousands of indigent asylum applicants, including those detained in immigration detention facilities across the United States. Human Rights First has conducted extensive research and issued reports regarding the current and historical practices of and legal framework governing the United States system of immigration detention and parole of asylum seekers.

INTRODUCTION AND SUMMARY OF ARGUMENT

On December 15, 2016, this Court issued a text order calling for supplemental briefing on three issues, including whether the Constitution requires the Government to afford bond hearings to individuals seeking admission to the United States who are subject to detention for six months under 8

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[1] The parties have consented in writing to the participation of *amicus*. Their written consents have been filed with the Clerk of the Court. No party in this case authored this brief in whole or in part, or made any monetary contribution to its preparation and submission.

U.S.C. § 1225(b).[2] Petitioners have argued that the availability of parole proceedings renders prolonged detentions under Section 1225(b) constitutional or that parole proceedings are an otherwise adequate substitute for a custody hearing by an immigration judge. That is not correct. As Respondents have demonstrated, the existence of parole authority under 8 U.S.C. § 1185(d)(5), even if exercised in accordance with relevant regulations and guidelines, cannot provide constitutionally sufficient due process because it does not provide a hearing before a neutral decision-maker and gives rise to prolonged arbitrary detention. Resp'ts Br. at 30-31 (citing J.A. 225-35, 334-35, 339; App. 39a-40a); *see* Resp'ts Supp. Br. at 24-25.

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[2] Human Rights First's first amicus brief with eight international law scholars explained that domestic statutes like the INA must be construed in a manner consistent with U.S. treaty commitments, *see Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), and that U.S. treaty commitments and settled international law prohibit arbitrary detention and require review of detentions by a court independent of the detaining authority. *See generally* Brief of *Amici Curiae* Human Rights First and International Law Scholars William Aceves, Denise Gilman, Guy S. Goodwin-Gill, James C. Hathaway, Manfred Nowak, Sarah Paoletti, Nigel Rodley, and Martin Scheinin in Support of Respondents. Human Rights First respectfully submits that those arguments are relevant to the constitutional issues on which the Court called for supplemental briefing because, as this Court has previously recognized, the opinion of the international community may provide persuasive guidance in deciding questions of constitutional interpretation, including under the Due Process Clause. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 577-78 (2005); *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003); *Atkins v. Virginia*, 536 U.S. 304, 306 n.21 (2002). Human Rights First refers the Court to its initial brief in that regard.

Human Rights First agrees with Respondents' analysis and submits this brief to explain that, in practice, even the basic parole criteria and procedures set out in the relevant regulations and guidelines are often not followed. Petitioners asserted in their opening brief that "aliens who establish a credible fear are automatically considered for parole, and are ordinarily released if they provide sufficient evidence of their identity and show they will not be a flight risk or danger." Pet'rs Br. at 4. Human Rights First's research and experience shows unequivocally that this is not so. Instead, arriving asylum seekers who establish a credible fear of persecution often do not receive parole interviews or determinations, and those who do are subject to arbitrary and inconsistent application of parole criteria. Moreover, as Petitioners indicate in their supplemental brief, the President's Executive Order of January 25, 2017 appears to signal a shift away from the policy Petitioners describe. *See* Pet'rs Supp. Br. at 11 n.3. The result is that the parole process contributes to, rather than ameliorates, the unconstitutional, arbitrary and prolonged detentions experienced by Respondents.

ARGUMENT

I. For Years, the Parole Authority Has Been Exercised Arbitrarily and Inconsistently

U.S. immigration authorities have, over the course of many years, implemented parole inconsistently, often failing to parole asylum seekers who meet the applicable parole criteria.

Under the expedited removal provisions of the Illegal Immigration Reform and Immigrant

Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 10 Stat. 3009, immigration inspectors at ports of entry may order the removal, without further hearing, of "arriving aliens" who they determine are inadmissible for lack of proper documents or for fraud. 8 U.S.C. § 1225(b)(1)(A)(i). Those who indicate a fear of persecution or intent to apply for asylum are to be referred for "credible fear" screening interviews to determine whether they will be permitted to file for asylum before an immigration judge. *Id.* § 1225(b)(1)(A)(ii). Specifically, an alien must establish "a credible fear of persecution" in an interview with an asylum officer or in a subsequent review by an immigration judge to avoid immediate deportation. *Id.* § 1225(b)(1)(B).

Although IIRIRA provides for the initial detention of asylum seekers subject to expedited removal, an individual seeking asylum may be released on parole once she has established a credible fear of persecution. *Id.* § 1185(d)(5) (providing for parole "on a case-by-case basis for urgent humanitarian reasons or significant public benefit" for an alien applying for admission to the United States); 8 C.F.R. § 212.5(b). Shortly after IIRIRA's enactment, the Immigration and Naturalization Service ("INS") confirmed in a December 1997 Memorandum that "[p]arole is a viable option and should be considered for aliens who meet the credible fear standard." Michael A. Pearson, INS Executive Associate Commissioner for Field Operations, *Memorandum: Expedited Removal: Additional Policy Guidance* (Dec. 30, 1997).

Despite these statutory provisions and related INS guidelines, the INS failed to implement its parole authority effectively, fairly, or consistently,

with local INS officials routinely failing to follow the parole criteria. A 1999 Amnesty International report concluded that "local INS officials are indifferent to or ignorant of both international standards and the agency's own attempts to impose some national standards on decisions to detain or parole asylum seekers." Amnesty International USA, *Lost in the Labyrinth: Detention of Asylum Seekers* 32 (1999). Other human rights organizations reached the same conclusion. *See generally* Lawyers Committee for Human Rights, *Refugees Behind Bars: The Imprisonment of Asylum Seekers in the Wake of the 1996 Immigration Act* (1998) (detailing INS failure to consistently and effectively implement parole and providing examples of asylum seekers who had been unnecessarily detained for long periods of time in the United States); Human Rights Watch, *Locked Away: Immigration Detainees in Jails in the United States* (1998), https://www.hrw.org/legacy/repo rts98/us-immig/ (concluding that asylum parole program has suffered from "inconsistent application by INS district directors").

On May 17, 1999, the U.S. Secretary of State's Advisory Committee on Religious Freedom addressed the detention of asylum seekers and concerns about the variation in release policies among INS districts. The Committee stated in its Final Report: "The unnecessary detention of already traumatized victims of religious persecution, as well as other types of persecution, should be examined with the goal of providing release. Serious concerns have been raised over the length of time these traumatized individuals are spending in detention facilities, the conditions they are being kept in, the types of detention facility that are being used and the variation in policies from

district to district." Bureau for Democracy, Human Rights, and Labor, U.S. Dept. of State, *Final Report of the Advisory Committee on Religious Freedom Abroad to the Secretary of State and to the President of the United States*, (May 17, 1999), https://www.state.gov/www/global/human_rights/990517_report/execsumm_iv.html#recs.

A 2004 survey conducted by Human Rights First (then known as the Lawyers Committee for Human Rights) confirmed that the parole guidelines were often disregarded in many locations—leaving many asylum seekers in detention for long periods of time even though they met the criteria for release. Human Rights First, *In Liberty's Shadow: The Detention of Asylum Seekers in the Era of Homeland Security* 12-13, 17 (2004) [hereinafter *In Liberty's Shadow*]. *Pro bono* attorneys in California, Illinois, Louisiana, Michigan, Minnesota, New Jersey, New York, Pennsylvania, and parts of Texas reported that the asylum seekers they represented were regularly denied parole from detention despite meeting the parole guidelines, and some reported that officials had advised them of "blanket" parole denial policies. *Id.*

The arbitrary implementation of parole during this period is reflected by the case of three Rwandan asylum seekers, which was detailed in Human Rights First's 2004 report:

- Three asylum seekers from Rwanda, a married couple and a relative, fled Rwanda after surviving direct threats on their lives because of their pro-democracy political affiliations. In search of refuge, they came to the United States because they had family here.

> Although they had traveled with valid passports and visas, the family was detained by the INS at the airport when they told officials that they had come to seek asylum—making their "non-immigrant" visas invalid in the eyes of immigration officers. The two men were taken to a large detention facility in one state and the young woman was moved to a prison for criminals in another state. At the prison, no one spoke her language. Prison authorities, without explanation, sheared off her long, braided hair. After passing their credible fear screening interviews, all three applied for parole so they could live with their U.S. relatives while final resolution of their cases was pending. The young woman was released on parole. The two men, however, were both denied parole by immigration officials in the other state. Even though both men had the same community ties and same proof of identity (their own valid passports), their parole applications were denied on different grounds. The INS found that one man did not have sufficient documentation of his identity—even though the INS's own forensic experts authenticated his passport and visa. The other man was denied on the ground that he "had not established sufficient community ties"—even though both men and the woman were being sponsored by the same U.S. citizen relative. The two men were only released after they were granted asylum.

In Liberty's Shadow at 12-13.

In February 2005, Congress directed the bipartisan U.S. Commission on International Religious Freedom ("USCIRF") to examine whether immigration officers, in exercising expedited removal authority over aliens who may be eligible for asylum, were improperly encouraging withdrawals of applications for admission; failing to refer qualifying aliens for credible fear determinations; incorrectly removing such aliens to countries where they may face persecution; or improperly detaining such aliens, or detaining them under inappropriate conditions. USCIRF issued a comprehensive 500-page report on these issues, based in part on U.S. Immigration and Customs Enforcement ("ICE") statistics not normally available to the public, detailing the ways in which parole rates continued to vary widely across the country: parole rates were, for example, as low as 0.5% in New Orleans, 8.4% in New York and 3.8% in Newark, New Jersey. 1 U.S. Comm'n on Int'l Religious Freedom, *Report on Asylum Seekers in Expedited Removal* 33 (2005) [hereinafter 2005 Report]. The report found that "the formal release criteria are not being consistently applied," *id.* at 62, and it also found no evidence that ICE was following the parole criteria provided in the policy guidelines. The Commission concluded that variations in parole rates were associated with other non-guideline factors, including, for example, the airport or border entry post at which the asylum seeker had arrived. *Id.* at 62; *see also* U.S. Comm'n on Int'l Religious Freedom, *Expedited Removal Study Report Card: 2 Years Later* 5 (2007) [hereinafter USCIRF Report Card].

USCIRF made a number of recommendations to improve implementation of parole, and reiterated its

recommendations in subsequent reports. *See* 2005 report at 63-76; *see generally* USCIRF Report Card. In the February 2007 Report Card, USCIRF gave ICE a grade of "F" for its failure to codify the parole criteria into regulations and another "F" for its failure to ensure consistent and correct parole decisions by developing standardized forms and national review procedures. USCIRF Report Card at 6; *see also* Letter from Michael Cromartie, Chair, United States Commission on International Religious Freedom to Michael Chertoff, Secretary of Homeland Security, *USCIRF Expresses Concern to DHS Over New Policy Directive on Asylum Seekers*, (Dec. 14, 2007), http://www.uscirf.gov/news-room/press-releases/uscirf-expresses-concern-dhs-over-new-policy-directive-asylum-seekers (expressing concern that revised ICE parole criteria, issued in 2007, was not consistent with its recommendations).

Despite USCIRF's reporting and findings, inconsistencies and deficiencies persisted in parole implementation. A 2009 Human Rights First report concluded that "asylum seekers have been detained for months or sometimes for years, even when they can establish their identities, community ties, and that they do not present a flight risk or a danger to the community," and that the parole criteria specific to asylum seekers "have often been ignored by local officials who may base their decisions on other factors, such as the availability of detention 'bed space' at local facilities." Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison* 5 (2009). As indicated in that report, ICE statistics showed that parole rates dropped from 62.5% in 2003 to 41.23% in 2004 before plummeting to 4.2% in 2007. *Id.* at 35. These statistics showed

that at least 2,200 asylum seekers who were taken into custody in 2007 were detained for six months or longer. *Id.* at 39.

The 2009 report included the following case studies of asylum seekers who could have been released from detention on parole, but instead were held by ICE in U.S. jails and immigration detention centers for months or longer:

- **A Colombian refugee detained in an Arizona immigration jail for over a year**. A Colombian asylum seeker, who had been detained and tortured following his participation in a political demonstration in Colombia, was detained in a U.S. immigration jail in Arizona for 14 months even though he could have been released to the care of his U.S. citizen father and daughter. ICE denied his request for release on parole, even after an immigration court had ruled he was a refugee eligible for asylum. This refugee was finally released from detention two weeks after the judge's ruling was affirmed on appeal.

- **A Tibetan monk detained in Texas for over a year.** A Tibetan monk, who supported the Dalai Lama and was arrested for participating in pro-Tibetan demonstrations, was detained at an immigration jail in south Texas while his request for asylum was pending. He remained in detention for more than a year even though his attorney had previously made a request to ICE for his release on parole and even though he had proof of his identity as well as a sponsor willing to house him. He was only released

from detention after an immigration court granted his request for asylum.

- **An Ethiopian refugee and torture victim detained for 10 months.** An Ethiopian refugee, who had suffered torture and persecution in his home country because of his ethnic background, was denied parole and detained for 10 months at the South Texas Detention Center after he requested asylum at a U.S. port of entry. His pro bono attorney submitted, in support of his parole application, proof of his identity, an affidavit of support from his U.S. citizen cousin, and proof that he would have a place to live if released. The man was only released from detention after an immigration judge ruled he was a refugee eligible for asylum.
- **Woman seeking asylum from Burma detained seven months.** After a Burmese woman requested protection at a United States border entry point, she was detained and brought to the Pearsall detention center in Texas. She began to experience intestinal bleeding. Her pro bono attorney requested that she be released on parole, providing a letter of support from the woman's cousin who had already been granted asylum in the U.S and information on her medical problems. The request was denied by ICE two weeks later. This Burmese refugee spent seven months in jail and was only released after an immigration judge granted her request for asylum.

Id. at 6, 36-37.

These examples and reports could be multiplied many times over. They show that the administration of parole for arriving asylum seekers has been characterized by inconsistent and arbitrary decision-making for many years. As discussed below, these problems persist today.

II. ICE's Parole Authority Continues to be Administered Arbitrarily, Inconsistently and Often Without Regard for Parole Guidance

The parole process for arriving asylum seekers continues to be marked by arbitrariness, inconsistency and ineffectiveness. Petitioners described in their summary judgment briefing in the district court and in their merits brief in this Court how the parole system purportedly functions: that an asylum seeker who establishes credible fear is provided with an advisal that he or she may seek parole and a date for a parole interview, and that they will be "ordinarily released if they provide sufficient evidence of their identity and show they will not be a flight risk or danger." Pet'rs Br. at 4; Respondent's Notice of Cross-Motion and Motion for Summary Judgment, *Rodriguez v. Hayes*, No. 07-cv-03239 (C.D. Cal. March 15, 2013) ECF No. 299 at 12-13 [hereinafter Pet'rs Summ. J. Br.]; *see* U.S. Immigration and Customs Enforcement, *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture*, §§ 4.3, 6.2, 8.3 [hereinafter Parole Directive] (arriving asylum seekers who meet certain criteria should generally, subject to various exceptions, be released on parole if they: pass credible

fear screening, sufficiently establish identity, present no danger, and do not pose a flight risk).[3]

As detailed below, many refugees who establish credible fear have not received parole interviews or individualized parole determinations. Those whose parole applications are actually considered receive decisions that often ignore that the applicant has met the relevant criteria or eschew any individualized assessment in favor of blanket and impermissible determinations based on the availability of bed space, local ICE detention practices, or a desire to deter other asylum seekers.

A. Asylum Seekers Entitled to Parole Interviews and Consideration Often Do Not Receive Them

Petitioners have asserted that under agency parole guidance, arriving aliens "who establish a credible fear are automatically considered for parole." Pet'rs Br. at 4. Reports from nonprofit legal providers, as well as United States Citizenship and Immigration Services ("USCIS") and ICE data indicates, however, that arriving asylum seekers who have been determined to meet the credible fear screening standard are often not provided parole interviews or parole consideration.

Nonprofit legal organizations recently reported to Human Rights First that ICE fails to automatically conduct parole interviews of asylum seekers determined to have credible fear in many

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[3] As discussed more fully in Section III of this brief, the President's recent Executive Order signals a shift toward increased use of detention and has directed DHS to issue new policy guidance relating to the use of detention.

detention locations.[4] Human Rights First, *Lifeline on Lockdown: Increased U.S. Detention of Asylum Seekers* 17 (2016) [hereinafter *Lifeline on Lockdown*]; Human Rights First, *Detention of Asylum Seekers in New Jersey* 1-2 (2016) [hereinafter *New Jersey Report*]; Human Rights First, *Detention of Asylum Seekers in Georgia* 2-3 (2016) [hereinafter *Georgia Report*].

According to USCIS's 2015 Credible Fear Workload Summary Report, between January and September 2015 asylum officers issued 7,118 favorable decisions in credible fear determinations for arriving asylum seekers who had entered at a port-of-entry. U.S. Citizenship and Immigration Services, Credible Fear Workload Report Summary, FY 2015 Port of Entry (POE) Caseload, https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-FY15CF-and-RF-stats-2015-03-31.pdf. All of these individuals, under the system described by Petitioners, were entitled to parole consideration. Yet according to data provided to the American Civil Liberties Union,

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[4] Automatic consideration is critical because, according to a 2015 study, only 14% of immigrants held in detention nationwide have legal representation. Ingrid Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 73 (2015). In some areas, representation rates are even lower; the Southern Poverty Law Center found that at Stewart Detention Center in Georgia only six percent of detained immigrants had legal counsel. Southern Poverty Law Center, *Shadow Prisons: Immigration Detention in the South* 36 (2016) [hereinafter *Shadow Prisons*]. Yet access to legal counsel significantly increases a noncitizen's odds of obtaining asylum or other relief. Katzmann Immigrant Representation Study Group & Vera Institute of Justice, *The New York Immigrant Representation Study: Preliminary Findings* (May 3, 2011), http://nylawyer.nylj.com/adgifs/decisions/050411 immigrant.pdf.

ICE reported that only 3,505 total cases were considered for parole during the same period. *Lifeline on Lockdown* at 17. Moreover, as described by Petitioners in the District Court, ICE reported that it conducted 1,836 parole interviews of arriving asylum seekers between January 4, 2010 and October 2011.[5] Pet'rs Summ. J. Br. at 12. But USCIS asylum division statistics indicate that during the same time period there were 4,156 arriving asylum seekers found to have met the credible fear standard. *See* U.S. Citizenship and Immigration Services, USCIS Asylum Division Stakeholder Meeting, Credible Fear Workload Report Summary FY 2011 Port of Entry (POE) Caseload 3 https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2011/November%202011/CredibleFearandReasonableFearWorkload.pdf (for FY 2011); U.S. Citizenship and Immigration Services, USCIS Asylum Division Stakeholder Meeting Credible Fear Workload Report Summary FY 2010 Port of Entry (POE) Caseload at 2 https://www.uscis.gov/sites/

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[5] Petitioners indicated that 1,404 of these 1,836 asylum seekers were granted parole. Pet'rs Summ. J. Br. at 12. This does not reflect the true rate of parole grants among asylum seekers for that period, however, because it does not account for the much larger pool of individuals who established credible fear, and were thus entitled to parole interviews, but did not receive them. Even if those statistics accurately reflected parole rates, they would have represented only a short-term peak in January 2010 through October 2011; for the period October 2014 through May 2015, ICE granted only 47% of parole requests in cases where a parole request was made. American Civil Liberties Union of Northern California, *ACLU Files Suit Seeking Information on ICE Policies for Asylum Seekers*, (Oct. 20, 2016), https://www.aclunc.org/news/aclu-files-suit-seeking-information-ice-policies-asylum-seekers.

default/files/USCIS/Outreach/Upcoming%20National%20Engagements/National%20Engagement%20Pages/2010%20Events/October%202010/Credible%20Fear%20Workload%20%28thru%20Sept%202010%29.pdf (for Jan 2010-Sept 2010).

These figures suggest that a large population of asylum seekers entitled to parole interviews—roughly half—may never have received consideration.

B. Asylum Seekers Remain Detained Despite Meeting Parole Criteria

Contrary to Petitioners' contention that arriving asylum seekers who establish credible fear "are ordinarily released if they provide sufficient evidence of their identity and show they will not be a flight risk or danger," Pet'rs Br. at 4, reports from attorneys and nonprofit organizations indicate that asylum seekers continue to be held in detention and are regularly denied parole despite demonstrating a lack of flight risk in their individual cases and otherwise meeting parole criteria. In a 2016 survey of nonprofit attorneys assisting asylum seekers across the country, 91% reported that ICE denied parole in cases where arriving asylum seekers appeared to satisfy the parole criteria. *Lifeline on Lockdown* at 3, 13.

In particular, ICE officials often deny parole based on unexplained assertions that asylum seekers constitute a "flight risk" despite evidence of family or other community ties or on purported failures to sufficiently establish identity despite considerable documentation establishing their identities. *See Id.*, at 2-3, 13-19, 20-22; *Georgia Report* at 2-3; *New Jersey Report* at 2-3.

Human Rights First's 2016 survey of attorneys assisting asylum seekers in detention indicated that "flight risk" was the top reason given by ICE to deny parole. Factors for consideration in determining whether an asylum seeker is a flight risk include community and family ties. Parole Directive § 8.3(2)(b). But attorneys reported that parole was often denied in cases that appeared to satisfy the criteria for confirming lack of flight risk criteria—including cases where sponsor letters from U.S. family members were provided and ties to churches, family members, and community organizations were confirmed. *Lifeline on Lockdown* at 16. One experienced nonprofit attorney in Pennsylvania noted, "In the responses I've seen [from ICE], everyone is a flight risk." *Id.*

The 2016 Human Rights First report provides the following example:

- **Victim of severe domestic violence held in detention five months despite four U.S. citizen sponsors, including police officer.** A woman fled the Dominican Republic to escape years of severe domestic violence from her former partner. She arrived at a New York airport in March 2015, expressed a fear of return to her country, and was detained at the Delaney Hall Detention Facility in New Jersey. After she was determined to have a credible fear of persecution, her pro bono attorney submitted a parole request supported by letters from four U.S. citizens, including her U.S. citizen cousin who is a New York City police officer, and her U.S. citizen fiancé. Moreover, she had a valid passport that proved her identity and had no

> criminal history. ICE denied her parole request indicating that she was a "flight risk." She was ultimately granted asylum at the end of July 2015 after spending nearly five months in detention.

Id. at 2, 16.[6]

Other asylum seekers continue to be held in detention for failure to sufficiently establish their identity even when they have submitted considerable documentation establishing their identities. *See Id.* at 2-3, 13-19, 20-22. As a result, many asylum seekers—particularly those from Africa—who meet this parole criterion continue to be held in immigration detention for many months. *Id.* at 14-

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[6] In cases where there are real flight concerns, there are alternatives to detention that are more consistent with constitutional requirements and have proven effective in addressing flight risk, such as community-based case management programs. "Studies since 1996 have showed very high rates of compliance with proceedings by asylum seekers who were placed into alternatives to detention." American Immigration Council, *A Humane Approach Can Work: The Effectiveness of Alternatives to Detention for Asylum Seekers* 2 (2015); *see* United States Conference of Catholic Bishops et al., *Unlocking Human Dignity: A Plan to Transform the U.S. Immigrant Detention System* 28-29 (2015) (outlining use of alternatives to detention in the United States and their effectiveness in securing appearance for hearings and compliance with immigration appointments). A 2000 study by the Vera Institute concluded that "[a]sylum seekers do not need to be detained to appear for their hearings. They also do not seem to need intensive supervision." Eileen Sullivan et al., Vera Inst. of Justice, *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program* 31 (2000). And 93% of all non-detained immigrants with legal representation appear in immigration court. *See* Eagly & Shafer, *supra* note 4.

15; *see Georgia Report* at 2-3; *New Jersey Report* at 2-3. For example, a woman who fled persecution and severe sexual violence in Guinea was held in a Texas detention facility for nearly one year because she did not have an original passport despite having other evidence of identity, and a Syrian asylum seeker who submitted thirteen documents as evidence of his identity was found not to have established his identity. *Lifeline on Lockdown* at 14-15. In addition:

- **A Nigerian refugee who fled the Boko Haram was blocked from parole and detained for over five months despite presenting multiple forms of identification.** After his wife and oldest child were killed by the Boko Haram, a Nigerian man fled his country and sought protection in the United States. After he requested protection at an official port of entry along the southern border, ICE sent him to the South Texas Detention Complex in Pearsall, Texas. After passing his credible fear interview, he requested parole with assistance from a local nonprofit legal organization. Despite submitting a police identification card and his birth certificate, ICE denied parole citing a failure to establish identity. The applicant was later able to secure and submit to ICE his national Nigerian identity card. Eventually, ICE said they would only release him from detention on parole if he could pay a $7,500 bond attached as a condition of release. The man could not afford to pay the bond and remained in detention for nearly six months. *Id.* at 26.

A 2015 statistical analysis by the Center for American Progress ("CAP") found that a large percentage of LGBT asylum seekers eligible for release are nonetheless detained. *See generally* Sharita Gruberg & Rachel West, Center for American Progress, *Humanitarian Diplomacy: The U.S. Asylum System's Role in Protecting Global LGBT Rights* (2015). The report found that ICE elected to detain two-thirds of the LGBT immigrants who were recommended for release by ICE's internal automated detention recommendation system. *Id.* at 24-25. Half of these detainees were arriving asylum seekers who were denied parole. The report also concluded that the length of time LGBT asylum seekers and immigrants are held in detention had increased. *Id.* CAP later found that release rates for LGBT asylum seekers fell over the next year. *See* Sharita Gruberg, Center for American Progress, *ICE Officers Overwhelmingly Use Their Discretion to Detain LGBT Immigrants*, (Oct. 26, 2016), https://www.americanprogress.org/issues/lgbt/reports/2016/10/26/291115/ice-officers-overwhelmingly-use-their-discretion-to-detain-lgbt-immigrants/ (finding ICE officers detained 88% of LGBT asylum seekers and immigrants eligible for release).

By ignoring relevant parole criteria, ICE parole determinations are arbitrary and inconsistent, and lead to unnecessary and prolonged detention.

C. Parole Decisions Are Often Not Based on Individualized Factors

Asylum seekers who meet the parole criteria are often denied parole for reasons that have nothing to do with their individual circumstances. *Lifeline on Lockdown* at 19-22. For instance, asylum seekers

have been denied parole simply because detention bed space is available. *See* U.S. Comm'n on Int'l Religious Freedom, *Barriers to Protection* 47-48 (2016) (parole bond rates reported to be based on availability of detention beds); *c.f.* Dept. of Homeland Security, Office of Inspector General, *ICE's Release of Immigration Detainees*, OIG-14-116 at 1-2 (2014) (noting hundreds of detainees released in part due to lack of bed space), http://immigrantjustice.org/sites/immigrantjustice.org/files/OIG_Report_ICEdetaineerelease_2014_08.pdf.

Many detention and parole decisions appear to be based on an impermissible desire to deter other asylum seekers from seeking U.S. protection. One of Human Rights First's pro bono asylum clients, a victim of political persecution from Bangladesh, was told by ICE that he would not be released on parole because "no one from Bangladesh will be released from detention until they have been inside for at least six months." *Lifeline on Lockdown* at 23-24. And a Chinese woman who sought asylum was denied release from detention because she was an "irregular maritime arrival." *Id.* at 22. As detailed in a comprehensive legal analysis conducted by the Yale Law School's Allard K. Lowenstein International Human Rights, the prolonged detention and penalization of asylum seekers due to their manner of entry, or based on an objective of deterring others, is prohibited by the Refugee Convention, its Protocol, and the International Covenant on Civil and Political Rights (ICCPR). Lara Dominguez, et al., Allard K. Lowenstein Int'l Human Rights Clinic, Yale Law School, *U.S. Detention and Removal of Asylum Seekers: An International Human Rights Law Analysis* 17-20 (2016). And in *R.I.L-R v. Johnson*, 80

F. Supp. 3d 164 (D.D.C. 2015), a federal judge enjoined DHS's policy of detaining Central American families who were apprehended in the interior of the country in order to deter future immigration, finding that justifying civil detention by deterrence raised serious constitutional concerns. *Id.* at 188-90 (citing *Kansas v. Crane*, 534 U.S. 407, 412 (2002)); *see also Crane*, 534 U.S. at 412 (warning that civil detention may not "become a mechanism for retribution or general deterrence—functions properly those of criminal law, not civil commitment") (internal quotation marks omitted) (Kennedy, J., concurring).

Asylum seekers are also denied parole based upon the idiosyncratic practices of their particular local ICE officials. In southern detention centers, for example, the Southern Poverty Law Center has characterized the odds of securing release on parole as "unsurmountable." *See Shadow Prisons* at 9, 11; *see also* Southern Poverty Law Center, *Immigrant detainees in Georgia more likely to be deported than detainees elsewhere*, (Aug. 23. 2016), https://www.splcenter.org/news/2016/08/23/immigrant-detainees-georgia-more-likely-be-deported-detainees-elsewhere. According to the Southern Poverty Law Center and Syracuse University's Transactional Records Access Clearinghouse, no immigrant detained at the Stewart Detention Center or Irwin County Detention Center in Georgia, which hold arriving asylum seekers as well as a range of other immigration detainees, was granted parole in fiscal year 2015. *See* Transactional Records Access Clearinghouse at Syracuse University, *Detainees Leaving ICE Detention from the Irwin County Detention Center*, http://trac.syr.edu/immigration/detention/201509/IRWINGA/exit/ (last visited Feb. 9,

2017); *see also* Transactional Records Access Clearinghouse at Syracuse University, *Detainees Leaving ICE Detention from the Stewart Detention Center*, http://trac.syr.edu/immigration/detention/201509/STWRTGA/exit/ (last visited Feb. 9, 2017); *Georgia Report* at 1.

In New Jersey, only three out of 80 arriving asylum seekers represented by the American Friends Service Committee between February 2015 and September 2016 were granted parole and subsequently released. *New Jersey Report* at 2. Not one of the 11 New Jersey detainee asylum seekers who were represented by Human Rights First and its pro bono attorneys in the 18 month period ending in November 2016 were granted parole. *Id.* Instead, they spent an average of eight months detained in New Jersey correctional or similar facilities before being granted asylum or other relief. *See id.* at 1-2. And a recent analysis of ICE data obtained through a Freedom of Information Act request indicates that for the months of January to August 2015, four field offices (Atlanta, FLO, SEa, and York), granted none of the parole requests submitted by arriving asylum seekers. An additional four field offices (ADE, FNL, New Orleans, and SEA) had grant rates of 1-13% for the parole requests they received during the same period.[7] In contrast, the Los Angeles Field Office granted 32% parole requests that it received in this time period.

ICE has also denied parole based on general immigration enforcement priorities rather than on

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[7] The FOIA response containing these statistics did not contain a legend indicating which offices these abbreviations referred to.

individualized assessments of the particular individual's risk of flight or danger. For example, some ICE officers interpreted a 2014 Department of Homeland Security ("DHS") priorities memorandum as placing arriving asylum seekers who presented themselves at U.S. ports of entry in the highest priority level for detainment even after they had passed through the credible fear screening process.[8] This led some ICE officers to continue to detain some noncitizens due to this perception even when a particular asylum seeker appeared to have otherwise qualified for parole due to their individual circumstances, such as lack of flight risk and satisfying other parole criteria:

- **Colombian Family Separated and Detained as Enforcement Priority.** A family fled persecution in Colombia, and requested asylum after arriving at a U.S. airport. They were traveling with valid passports. Customs and Border Protection officers decided to consider their visas invalid because the family requested asylum, separated the family and sent them to different detention facilities. The wife and her daughter were sent to a "family"

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[8] DHS confirmed in August 2016 that arriving asylum seekers whose cases originate at the border are not blocked from parole by the 2014 DHS enforcement priorities memorandum and should be assessed for potential parole eligibility after passing a credible fear screening. *See* C-SPAN, *Immigration and Asylum Detention Policies* (Aug. 3, 2016), https://www.c-span.org/video/?413552-1/discussion-focuses-detention-removal-asylum-seekers (Deputy Assistant Homeland Security Secretary for Immigration Policy confirming that asylum seekers who pass credible fear screening, establish identity and lack of flight risk, should generally be released).

detention facility while the husband and grandfather were sent to a detention facility in Georgia, where they were detained for six months. They were denied parole even though they had strong parole applications that included the valid passports that they had presented upon arrival. They were told only that they were denied parole because they were enforcement "priorities," and only released after advocacy and reporting by Human Rights First.

- **Honduran Woman Persecuted for Resisting Forced Abortion Detained as Enforcement Priority.** A Honduran woman who fled rape, torture, and abuse for resisting an abortion was detained for six months and told she was not eligible for parole because she was an enforcement "priority."

Lifeline on Lockdown at 3.

As these reports and examples indicate, asylum seekers are often unnecessarily held in detention arbitrarily and sometimes for prolonged periods without an individualized assessment of whether the particular asylum seeker is not a flight risk and meets other applicable parol criteria. The possibility of parole does not eliminate that problem.

D. Many Asylum Seekers Do Not Receive Adequate Explanations of Parole Denial

Even when ICE does consider an arriving asylum seeker for parole, ICE officers often fail to provide a clear reason—or at times, any explanation—for denials of parole. As described by Petitioners, any asylum seeker denied parole must be provided with

written notification of the denial, including an explanation of the reasons for denial and information regarding the procedure to request a redetermination of parole eligibility based on changed circumstances or additional evidence. Pet'rs Summ. J. Br. at 13; *see* Parole Directive § 6.6. But nonprofit attorneys have reported that asylum seekers held in facilities in New Jersey, Texas, California, and Pennsylvania have failed to receive written parole denials. *Lifeline on Lockdown* at 17. When ICE does provide written notification that parole has been denied, it often does so without indicating the reason for the denial. For example:

- **Asylum seeker with extensive U.S. ties denied parole without explanation and detained for six months.** A 19-year old victim of severe gang-based violence in El Salvador arrived at a port-of-entry along the U.S. southern border and requested asylum in 2015. She was placed in expedited removal proceedings and detained at the Tri-County Detention Center in Ullin, Illinois, where she was determined to have a credible fear of persecution. She did not receive an advisal concerning parole or an automatic interview. Her attorney later sought parole on her behalf, submitting a copy of her national identification card, and citing her lack of any criminal history and strong community ties. Both of her parents lived in Manassas, Virginia and had stable jobs, and her uncle, a U.S. citizen, provided a letter of support stating that he would sponsor her. Four days later, her attorney received a faxed, one-sentence denial stating, "Your parole

request for xxx-xxx-xxx has been denied." She ultimately spent over six months in detention.

- **Political asylum seeker from Belarus denied parole without adequate explanation and detained for four months.** An asylum seeker from Belarus was sent to the Pulaski County Detention Center in Kentucky in 2016. He passed his credible fear screening, reporting that he had suffered persecution, imprisonment and beatings due to his participation in political demonstrations against the Belarusian president. He did not receive an automatic parole interview. After he proactively requested parole, he was provided a one-sentence parole denial from ICE that did not even explain the reasons for the denial. He spent four months in detention and was released on parole only after considerable advocacy by a local nonprofit legal organization.

- **Refugee from Egypt denied parole without explanation and detained for nine months after immigration court ruled eligible for asylum.** An Egyptian man fled Egypt after he was pursued by the police for his journalistic and human rights activities. He arrived at a port of entry in November 2015 and was sent to the York County Detention Center in Pennsylvania, where he was found to have met the credible fear standard. He was never interviewed for parole. Instead, before his first court hearing, he received a letter from ICE stating that he would not be released because he was both a flight and security risk—with no

> additional detail or explanation. In April 2016, after nearly six months of detention, an immigration judge ruled that the man was a "refugee" and should be granted asylum, but ICE continued to hold him in detention. He submitted numerous requests for release to no avail. ICE responded with a decision stating that he would not be released because he was "subject to mandatory detention as an arriving alien," even though he had already passed out of the expedited removal process and was thus eligible for consideration of release on parole. ICE indicated that the reason for his continued detention was that the judge's "decision to grant [him] asylum may be overturned on appeal." Since then, the man has submitted numerous additional requests and letters of support from U.S. citizens, including a close friend who would sponsor him. He also submitted a copy of his Egyptian passport and his Egyptian national identification card. In response, a deputy field office director indicated that the man would be detained for the duration of his BIA appeal and that this "administrative decision is final and may not be appealed."

Lifeline on Lockdown at 18.

In sum, ICE has executed its parole authority arbitrarily and inconsistently, failing in many cases to conduct parole interviews or issue determinations at all. When ICE fulfills its obligation to make parole determinations, it often does so with disregard to the particular individual's eligibility for parole under the factors contained in the statute, regulations, and

guidance, based upon impermissible and non-individualized factors, or without explanation. The result is that the implementation of the parole authority, instead of operating as a procedural safeguard for detained asylum seekers, causes and contributes to prolonged and unconstitutional detentions.

III. Arbitrary Application of Parole Guidelines Results in Unconstitutional Arbitrary and Prolonged Detentions, Which Are Likely To Increase

Immigration detention is now at an all-time high, United Nations Working Group on Arbitrary Detention, *Preliminary 2016 Findings from its visit to the United States of America*, (Oct. 24, 2016), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20746&LangID=E#sthash.U0LK7hDR.dpuf; Devlin Barrett, *Record Immigrant Numbers Force Homeland Security to Search for New Jail Space*, Wall St. J., Oct. 21, 2016, https://www.wsj.com/articles/record-immigrant-numbers-force-homeland-security-to-search-for-new-jail-space-1477042202, and a larger proportion of those now held in immigration detention are asylum seekers, *see* Kate Morrissey, *Even before Trump, asylum seeker already caught up in clogged system*, San Diego Union-Tribune, Jan. 20, 2017, http://www.sandiegouniontribune.com/g00/news/immigration/sd-me-asylum-detention-20170120-story.html?i10c.referrer=https%3A%2F%2Fwww.google.coms%2F.

Recent reporting and analysis suggests that this trend results, at least in part, from arbitrary parole denials. *See Shadow Prisons* at 11-12. Without

prompt immigration court custody review, immigration detainees will have no recourse to prevent prolonged detention where parole has been arbitrarily denied. Consider these examples:

- **Political activist from Bangladesh with U.S. ties and identity documentation released from detention after seven months due to immigration court custody hearing.** A Bangladeshi man, now represented *pro bono* by Human Rights First, fled Bangladesh due to political persecution. After presenting himself to authorities at a formal port of entry along the southern U.S. border and requesting protection, he was classified as an arriving alien, placed in expedited removal, and detained in California. After passing his credible fear interview, he provided ICE with letters of support from three close friends, all U.S. citizens living in New York, who attested to his identity, were willing to house him and agreed to ensure his appearance at immigration hearings and appointments. His ICE deportation officer denied parole on the stated ground that he provided insufficient evidence of his identity. In response, the asylum seeker obtained an original birth certificate from family in Bangladesh and provided it to the officer. His deportation officer verbally told him "no one from Bangladesh will be released from detention until they have been inside for at least six months." ICE did not provide him with a written parole denial. After he was detained for about seven months, he had a *Rodriguez* bond hearing before an immigration judge in

California. The judge set his bond at $13,000, which was more than he could afford. His family had to borrow money to pay the bond. As a result of the bond hearing, he was released from detention after seven-and-a-half months. *Lifeline on Lockdown* at 23.

- **Victim of rape and torture, abused for resisting abortion, detained for six months and denied parole despite strong community ties.** A Honduran woman was raped and beaten by her domestic partner, who punched her in the stomach while she was pregnant and tried to yank her baby out when she refused to get an abortion. Country reports for Honduras show that there is a dire lack of state protection for women in similar situations. The woman fled this abuse and presented herself to immigration officials at a U.S. port of entry along the southern border in 2015. She was sent to the Mesa Verde Detention Facility in Bakersfield, California, where she passed her credible fear interview. Her five parole requests were supported by evidence that she would live with a close family friend who is a U.S. lawful permanent resident, that she had a U.S. citizen mother who lived near the family friend, and that she suffered from chronic headaches due to an injury that made her detention unbearable. A sponsor letter, financial records, identity documents of her sponsor, and medical documents relating to medical care received in detention were all submitted to ICE on five different occasions, both via email and fax. Each of the written parole denials provided to the woman

contained boilerplate language stating, "You have not established to ICE's satisfaction that you will appear as required for immigration hearings, enforcement appointments, or other matters, if you are paroled from detention." In December 2015, the woman was finally released after a *Rodriguez* bond hearing in which the immigration judge considered her eligibility for release and set her bond in the amount of $1,500, which the family was able to gather with the help of friends. *Id.* at 16-17.

- Transgender refugee denied parole, forced to remain in male housing unit of detention center where she was sexually assaulted multiple times. A 21-year-old transgender woman from Honduras sought protection at a U.S. port of entry on the southern border in 2016. She had fled Honduras after a brutal experience of persecution due to her gender identity. She was detained and sent to the Hudson County Correctional facility, where she was housed with men, despite identifying as a woman and requesting to not be housed with men. After she passed her credible fear interview, the refugee requested release from detention on parole. She provided ICE with her national identity card and letters of support from multiple family members who resided in Florida and were willing to sponsor her release from detention. Her *pro bono* attorney presented proof she had no criminal history, proof of her young age, and her high risk of sexual assault in detention as a transgender woman. However, ICE denied her request for parole. During her detention, she

was sexually assaulted numerous times. After six months in detention, she was ruled to be a refugee and was granted asylum by an immigration judge. Only then was she released from detention.[9] *See* Gemma Hallett, *Asylum Seekers Already Face Arbitrary and Prolonged Detention*, Human Rights First (Feb. 9, 2017), http://www.humanrightsfirst.org/blog/asylum-seekers-already-face-prolonged-detention-due-lack-parole.

- **Woman who sought asylum from political persecution in Cameroon held in detention as she cannot afford to pay $15,000 parole bond.** A woman who sought asylum at a U.S. port of entry along the southern border in 2016 reported that she had fled political persecution, arrest, rape, and detention in Cameroon due to her refusal to divulge information about a family member, a local opposition political

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[9] This example highlights one of many ways that detention can harm the health of asylum seekers. In June 2003, Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture documented the impact of detention on the health of asylum seekers, including arriving asylum seekers who were held in detention instead of being released on parole. *See* Physicians for Human Rights & The Bellevue/NYU Program for Survivors of Torture, *From Prosecution to Prison: The Heath Consequences of Detention for Asylum Seekers* (2003). Their comprehensive report confirmed that detained asylum seekers suffer from extremely high levels of anxiety, depression and Post Traumatic Stress Disorder and that the already poor psychological health of asylum seekers worsens the longer that they are detained. *Id.* In fact, 86% of the interviewed asylum seekers suffered significant depression, 77% suffered anxiety and 50% suffered from Post Traumatic Stress Disorder. *Id.* at 1-2.

> leader who had gone into hiding. After she passed her credible fear interview, she attempted to secure release on parole. She provided to ICE her original national identity card and birth certificate as well as a supporting letter from a U.S. citizen friend who was willing at act as her sponsor. ICE would not release her on parole unless she could pay a $15,000 bond, an amount that she could not afford to pay. *Id.*

Concerns regarding the increasing escalation of arbitrary use of detention are further exacerbated by the President's January 25, 2017 Executive Order, entitled "Border Security and Immigration Enforcement Improvements." *See* Exec. Order No. 13767, 82 F.R. 8793 (Jan. 30, 2017) [hereinafter Executive Order]; Human Rights Watch, *US: Trump's Immigration Actions to Harm Millions* (Jan. 25, 2017), https://www.hrw.org/news/2017/01/25/us-trumps-immigration-actions-harm-millions. The Executive Order directs the Secretary of Homeland Security to "take all appropriate action and allocate all legally available resources to immediately construct, operate, control, or establish contracts to construct, operate, or control facilities to detain aliens at or near the land border with Mexico." Executive Order Sec. 5(a). It further directs the Secretary of Homeland Security to "immediately take all appropriate actions to ensure the detention of aliens apprehended for violations of immigration law pending the outcome of their removal proceedings or their removal from the country to the extent permitted by law" and to "issue new policy guidance to all Department of Homeland Security personnel regarding the appropriate and consistent use of

lawful detention authority under the INA, including the termination of the practice commonly known as 'catch and release.'" *Id.* Sec. 6.

With respect to the exercise of parole, the Executive Order directs the Secretary to take "appropriate action to ensure that parole authority . . . is exercised . . . only when an individual demonstrates urgent humanitarian reasons or a significant public benefit derived from such parole." *Id.* Sec. 11(d).

The Government's discussion of the executive order in its supplemental brief indicates that ICE "has had"—rather than "has"—a policy "to consider parole automatically and ordinarily to release the alien unless he fails to provide sufficient evidence of his identity or fails to show that he will not be a flight risk or danger." Pet'rs Supp. Br. at 11 n.3. The Executive Order raises concerns that more asylum seekers may be held in immigration detention for the duration of their immigration proceedings, regardless of the need for detention in their individual case, and that DHS and ICE may take steps to further limit access to release on parole for arriving asylum seekers, including for those who do not present a danger or risk of flight and have sufficiently established their identities.

This shift toward an increased emphasis on the already-growing practice of immigrant detention suggests that the flawed parole process will not serve as a sufficient safeguard against arbitrary and prolonged detention. As the examples discussed in this brief demonstrate, the parole process available to arriving asylum seekers falls far short of providing a

constitutional safeguard against prolonged and arbitrary detention.

CONCLUSION

For the reasons set forth above, this Court should affirm the Court of Appeals' decision in this case.

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DAVID JENNINGS, *ET AL.*,

Petitioners,

—v.—

ALEJANDRO RODRIGUEZ, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTEREST OF *AMICI*[1]

Human Rights First is a non-governmental organization established in 1978 that works to ensure U.S. leadership on human rights globally and compliance domestically with this country's human rights commitments. Human Rights First operates one of the largest programs for *pro bono* legal representation of refugees, working in partnership with volunteer lawyers at leading law firms to provide legal representation without charge to thousands of indigent asylum applicants, including some detained in immigration detention facilities across the United States. Human Rights First has conducted research, issued reports and provided recommendations to the United States Government regarding compliance with its legal obligations under international law with respect to its use of immigration detention.

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[1] The parties have consented in writing to the participation of *amici*. Their written consents have been filed with the Clerk of the Court. No party in this case authored this brief in whole or in part, or made any monetary contribution to its preparation and submission.

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INTRODUCTION AND SUMMARY OF ARGUMENT

This *amicus* brief addresses the obligation of U.S. courts to construe federal statutes, including the Immigration and Nationality Act (INA), in a manner consistent with the nation's obligations under binding treaties and customary international law. This has been an established canon of statutory construction since *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). Applying that canon here, this Court should avoid an interpretation of the INA that allows for prolonged detention without an individualized determination by a court, independent of the detaining authorities and capable of ordering release, that detention is reasonable, necessary and proportionate under the facts of the particular case.

Pursuant to treaties, such as the International Covenant on Civil and Political Rights ("ICCPR"), and customary international law, the United States must protect individuals' right to liberty. It may not detain any person arbitrarily and must provide certain safeguards to ensure that arbitrary detention does not occur. These protections apply to asylum seekers and other individuals held in U.S. immigration detention. In particular, the United States must provide for review by a court of each individual's detention and the detention should be subject to periodic review as it continues. The Government must show the reviewing court that the particular individual's detention is reasonable, necessary and proportionate in the circumstances of

the individual's case, and the detention must be subject to periodic reevaluation in which the Government must demonstrate that detention remains reasonable, necessary and proportionate as it becomes more prolonged.

The Government's interpretation of the INA cannot be squared with the United States' treaty obligations and the requirements of customary international law. According to the Government, the INA authorizes the prolonged detention of non-citizens while denying them access to an individualized immigration court custody hearing. The Government's interpretation, in short, would deny to large groups of asylum seekers and other non-citizens the rights and safeguards that the United States is obligated to provide under the ICCPR, other international treaties and customary international law.

These considerations provide further reason why this Court should reject the Government's construction of the INA and should affirm the Court of Appeals' decision.

I. The INA Should Be Interpreted Consistently with U.S. Treaty Obligations and Customary International Human Rights Law

Since the earliest days of the republic, this Court has recognized that domestic statutes must be read in light of this nation's binding obligations under international law. *See, e.g.*, *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801). "It has been a maxim of statutory construction since the decision in *Murray v. The Charming Betsy*, 2 Cranch 64, 118 (1804), that an act of congress ought never to be construed to violate the law of nations, if any other possible

construction remains." *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (internal quotation marks); *accord F. Hoffmann-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155, 164 (2004); *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 178 n.35 (1993); Restatement (Third) of the Foreign Relations Law of the United States § 114 (1987) [hereinafter Restatement (Third)]. Under these precedents, the INA should be interpreted so as not to conflict with the Government's obligations under international law.

The United States is bound by two sources of international law: (1) treaties to which the United States is a party, and (2) norms and practices that are so widespread as to become customary international law. Restatement (Third) § 102. Under *Charming Betsy* and its progeny, this Court must consider both of these sources when interpreting statutes that implicate the Government's obligations under international law. *See Chew Heong v. United States*, 112 U.S. 536, 539-40 (1884) (interpreting a statute so as not to violate terms of treaty); *Charming Betsy*, 2 Cranch at 118 (interpreting a statute so as not to violate "the law of nations").

The Government's practice of detaining non-citizens under §§ 1225(b) and 1226(c) of the INA for potentially prolonged duration without access to immigration court review is at odds with the ICCPR, a multilateral treaty that the United States has ratified without relevant reservation. *See* International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; 138 Cong. Rec. 8070-71 (1992). As discussed below, Article 9(1) of the ICCPR prohibits "arbitrary arrest or detention." In addition, Article 9(4) of the ICCPR

provides that anyone deprived of liberty by arrest or detention "shall be entitled to take proceedings before a court." Pursuant to executive order, it is the Government's "policy and practice . . . fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR." *Implementation of Human Rights Treaties*, Executive Order No. 13107, 63 Fed. Reg. 68,991 (Dec. 10, 1998).[2]

Other international instruments guarantee non-citizens rights that are similar to and complement those in ICCPR Article 9. The American Declaration of the Rights and Duties of Man ("American Declaration") provides in Article XXV that "[e]very individual who has been deprived of his liberty has the right to have the legality of his detention

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[2] Although, as this Court has acknowledged, the ICCPR is "not self-executing," *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004), *i.e.*, it is not directly enforceable in a private right of action in domestic courts absent enabling legislation, Restatement (Third) § 111(4) cmt. c, it nonetheless "bind[s] the United States as a matter of international law," *Sosa*, 542 U.S. at 735; *see* Restatement (Third) § 111 cmt. h. Accordingly, it is a source of binding obligations when construing a federal statute. *See Chew Heong*, 112 U.S. at 548-50; *Ma v. Ashcroft*, 257 F.3d 1095, 1114-115 (9th Cir. 2001) (construing 8 U.S.C. § 1231(a)(6) as requiring a reasonable time limitation on immigration detentions to avoid conflict with ICCPR); Denise Gilman, *Realizing Liberty: The Use of International Human Rights Law to Realign Immigration Detention in the United States*, 36 Fordham Int'l L.J. 243, 280-21 (2013) ("Regardless of their direct domestic effect, the United States is bound by the treaties that underlie the international human rights standards relating to immigration detention and thus has an international obligation to comply with those standards.").

ascertained without delay by a court."[3] And the United Nations Convention Relating to the Status of Refugees ("Refugee Convention") provides that the United States "shall not impose penalties" on arriving refugees "on account of their illegal entry or presence" in the country or restrict "the movements of such refugees" unless such restriction is "necessary." *See* United Nations Convention Relating to the Status of Refugees art. 31, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention]. Articles 2 through 34 of the Refugee Convention became binding on the United States through our accession to the United Nations Protocol Relating to the Status of Refugees ("Refugee Protocol"). *See* United Nations Protocol Relating to the Status of Refugees art. 1 ¶ 1, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter Refugee Protocol]. The Refugee Convention and Protocol are discussed in detail in the *amicus* brief of the United Nations High Commissioner for Refugees ("UNHCR").

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[3] *See* art. XXV, O.A.S. Res. XXX (1948), O.A.S. Off. Rec. OEA/Ser. LV/I. 4 Rev. (1965) [hereinafter American Declaration] (prohibiting arbitrary deprivations of liberty and requiring review of detentions "without delay by a court"). Although the American Declaration is not a binding treaty, it is a source of legal obligation for every member of the Organization of American States (OAS), and the United States is a member of the OAS. *See* Gilman, *supra* note 2, at 282 ("Through its membership in the OAS and ratification of the legally binding OAS Charter, the United States accepted binding obligations to protect the human rights set forth in the American Declaration. While the United States questions the exact nature of its obligations, . . . the government acknowledges that the American Declaration does serve as a source of obligation.").

The rights secured by Article 9 of the ICCPR and similar treaties are also fundamental rights under customary international law. Customary international law "results from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement (Third) §§ 102(2), 701(b). Evidence of its content includes "the customs and usages of civilized nations," "the works of jurists and commentators," *The Paquete Habana*, 175 U.S. 677, 700 (1900), and international agreements that "are intended for adherence by states generally and are in fact widely accepted," Restatement (Third) § 102(3). Commentators and courts alike have described the requirement of court review and the prohibition against arbitrary detention as binding international norms. *See id.* § 702(e) cmt. h; Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* 172-73 (2d ed. 2005); *see also, e.g., Kadic v. Karadzic*, 70 F.3d 232, 240 n.3 (2d Cir. 1995) (policy of prolonged arbitrary detention is a violation of international law); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981) ("No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment."); Alice Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants* (2011). Indeed, these requirements are part of every major international human rights agreement.[4]

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[4] *See, e.g.*, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 16(4), (8), *opened for signature* Dec. 18, 1990, 2220 U.N.T.S. 3 (entered into force July 1, 2003) [hereinafter

This Court should avoid an interpretation of the INA that would violate the Government's treaty obligations and its obligations under customary international law.

II. U.S. Treaty Obligations Require Individualized and Periodic Assessment of Whether Detention is Arbitrary

U.S. treaty and customary international law obligations prohibit states from subjecting any person to arbitrary detention. Consistent with that prohibition, states may detain a person only after establishing, on a case-by-case basis, that detention is reasonable, necessary and proportionate under the particular individual's circumstances. The related requirements relating to court review of immigration detention are outlined in Section III below. Where detention is initially upheld, the Government must ensure that detention does not become arbitrary over time. To avoid that possibility, the detention must be subject to periodic review to ensure that it

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Convention on Migrants' Rights]; Convention on the Rights of the Child art. 37, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter Convention on Children's Rights]; African (Banjul) Charter on Human and Peoples' Rights art. 6, June 27, 1981, 21 I.L.M. 58 (entered into force Oct. 21, 1986) [hereinafter African Charter]; American Convention on Human Rights art. 7(6), Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter American Convention]; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 5(4), Sept. 3, 1953, 213 U.N.T.S. 222 [hereinafter European Convention]; G.A. Res. 43/173, annex, Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, at Principle 11 (Dec. 9, 1988); G.A. Res. 217 A (III), Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter Universal Declaration].

remains reasonable, necessary and proportionate. The Government's position runs counter to these obligations.

A. The Government Must Provide for an Individualized Determination That a Non-Citizen's Detention Is Reasonable, Necessary and Proportionate

Article 9(1) of the ICCPR provides that every person "has the right to liberty" and "[n]o one shall be subjected to *arbitrary* arrest or detention." ICCPR art. 9(1) (emphasis added). The American Declaration similarly provides, in Articles I and XXV, that all persons have the right to liberty and that unlawful or arbitrary detention is prohibited. American Declaration arts. I, XXV. The prohibition against arbitrary detention "is recognized in all major international and regional instruments for the promotion and protection of human rights,"[5] and it has been "widely enshrined in national constitutions and legislation." U.N. Working Grp. on Arbitrary Det., Rep. of the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/22/44, ¶¶ 42, 43 (Dec. 24, 2012) [hereinafter 2012 Arbitrary Detention Report]. The "widespread ratification of international treaty law on arbitrary deprivation of liberty, as well as the widespread translation of the prohibition into national laws, constitute a near universal State practice evidencing the customary nature" of the prohibition. *Id.* ¶ 43.

This prohibition against arbitrary detention is applicable to state practices relating to immigration.

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[5] *E.g.*, African Charter art. 6; American Convention art. 7(3); European Convention art. 5; Universal Declaration art. 9.

As the U.N. Human Rights Committee, which supervises and monitors the implementation of ICCPR obligations, has explained, Article 9(1) of the ICCPR applies to all deprivations of liberty, including those related to immigration control. U.N. Human Rights Comm., General Comment No. 35: Article 9 (Liberty and Security of Person), U.N. Doc. CCPR/C/GC/35, ¶¶ 3, 12, 18 (Dec. 16, 2014) [hereinafter HRC General Comment No. 35]. The rights espoused in the ICCPR "must be guaranteed without discrimination between citizens and aliens." U.N. Human Rights Comm., General Comment No. 15: The Position of Aliens Under the Covenant, ¶ 2 (Sept. 30, 1986) [hereinafter HRC General Comment No. 15]; *accord* U.N. Human Rights Comm., General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add. 13, ¶ 10 (May 26, 2004) [hereinafter HRC General Comment No. 31] (stating that Covenant rights must be available "to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons"). Parties to the ICCPR, such as the United States, must also ensure "in their legislation and in practice" that immigrants are not denied their right to be free from arbitrary detention. *See* HRC General Comment No. 15, ¶ 4.

Detention is arbitrary if it is not "reasonable, necessary and proportionate in the light of the circumstances." HRC General Comment No. 35, ¶ 18. In order to ensure that these requirements are met, the decision to detain a person "must consider relevant factors case by case." *Id.*; *see also A v. Australia*, Communication No. 560/1993, U.N. Human Rights Comm., ¶ 9.2, 9.4, U.N. Doc.

CCPR/C/59/D/560/1993 (Apr. 30, 1997); François Crépeau (Special Rapporteur on the Human Rights of Migrants), Rep. of the Special Rapporteur on the Human Rights of Migrants, ¶ 53, U.N. Doc. A/HRC/20/24 (Apr. 2, 2012) [hereinafter Rapporteur's 2012 Report] ("States must take full account of individual circumstances" when considering whether to detain an immigrant or employ an alternative to detention). That decision must also take into account "all the circumstances" that bear on the reasonableness, necessity and proportionality of detention. *Van Alphen v. Netherlands*, Communication No. 305/1988, U.N. Human Rights Comm., ¶ 5.8, U.N. Doc. CCPR/C/39/D/305/1988 (July 23, 1990); *see also* HRC General Comment No. 35, ¶ 18.

The "necessity" principle allows states to resort to detention "only as a last available measure." U.N. Working Grp. on Arbitrary Det., Rep. of the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/1999/63, ¶ 78 (Dec. 18, 1998) [hereinafter 1998 Arbitrary Detention Report]. It also requires states to "take into account less invasive means of achieving the same ends" before resorting to detention. HRC General Comment No. 35, ¶ 18; *accord C. v. Australia*, Communication No. 900/1999, U.N. Human Rights Comm., ¶ 8.2, U.N. Doc. CCPR/C/76/D/900/1999 (Nov. 13, 2002). A determination that detention is necessary to protect the public or prevent flight requires "case by case" consideration of "less invasive means of achieving the same ends, such as reporting obligations,

sureties or other conditions."[6] HRC General Comment No. 35, ¶ 18. A "mandatory rule for a broad category" of individuals is impermissible. *Id.*; *accord A v. Australia*, ¶ 9.2 (noting that necessity must be determined in light of "all the circumstances of the case").

The Refugee Convention, as discussed in the U.N. High Commissioner for Refugee's *amicus* brief, provides that contracting states shall not impose restrictions on the movements of refugees "other than those which are necessary."[7] Refugee

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[6] As various international legal authorities and experts have explained, nations have numerous alternatives to detention that they can use to manage migration in ways that are consistent with international legal obligations. *See* Rapporteur's 2012 Report, ¶ 48 ("Research has found that over 90 per cent compliance or cooperation rates can be achieved when persons are released to proper supervision and assistance. The alternatives have also proved to be considerably less expensive than detention . . . ."); U.N. High Comm'r for Refugees, *Detention Guidelines*, at Annex A (2012) [hereinafter UNHCR Detention Guidelines] (outlining various alternatives to detention); U.S. Conference of Catholic Bishops et al., *Unlocking Human Dignity: A Plan to Transform the U.S. Immigrant Detention System* 28-29 (2015) (outlining use of alternatives to detention in the United States and their effectiveness in securing appearance for hearings and compliance with immigration appointments); Int'l Det. Coal., *There Are Alternatives* (2015) (outlining examples of alternatives used in the United States and many other countries and their effectiveness).

[7] As noted above, the United States has acceded to the Refugee Protocol, which provides that parties "undertake to apply articles 2 to 34 inclusive of the [Refugee] Convention to refugees." Refugee Protocol art. 1. Article 31's protections apply not only to asylum seekers who have come directly from territories where their life or freedom was threatened, but also to those who transited through other countries where they were

Convention art. 31(2); UNHCR Detention Guidelines, ¶¶ 21-30 (detailing, in the context of the detention of asylum seekers, the purposes for which initial detention may be "necessary" in an individual case)[8]; James C. Hathaway, *The Rights of Refugees Under International Law* 421-23 (2005) (Article 31(2)'s prohibition of "other than minimalist detention" to verify identity and circumstances of

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unable to find effective protection. *See* UNHCR Detention Guidelines, ¶ 4; Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention and Protection* ¶ 103 (2001). The United States is also a member of the Executive Committee of UNHCR. In 1998, the UNHCR Executive Committee issued a formal conclusion deploring that countries detain asylum seekers "on an arbitrary basis, for unduly prolonged periods, and without giving them adequate access to . . . fair procedures for timely review of their detention status." Conclusions Adopted by the Executive Committee on International Protection of Refugees, No. 85 ¶ dd, U.N. GAOR, 49th Sess., Supp. No. 12A, U.N. Doc. A/53/12/Add.1 (1998).

[8] The UNHCR Detention Guidelines are issued in conjunction with Article 35 of the Refugee Convention, and "reflect the state of international law relating to detention – on immigration related grounds – of asylum-seekers and other persons seeking international protection." UNHCR Detention Guidelines, ¶ 4. This Court and others have found other UNHCR guidance helpful in interpreting international legal obligations. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 (1987) (finding interpretative guidance in the "UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status" provides "significant guidance"); *Ins v. Aguirre-Aguirre*, 526 U.S. 415, 427-28 (1999) (declining to follow Handbook but recognizing it as a "useful interpretive aid"); *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (relying on UNHCR's Guidelines to find that women may constitute a particular social group).

arrival enjoins states "from detaining refugees on the basis of general rules that authorize prolonged detention as a response to unauthorized entry"). The Convention also prohibits the use of detention as a penalty or sanction for illegal entry or presence in a country. *See* UNHCR Detention Guidelines, ¶¶ 11, 32 (discussing Article 31(1)'s prohibition on the use of detention to penalize asylum seekers); Goodwin-Gill, *supra* note 7, ¶¶ 108, 111 ("penalties" include "imprisonment, and other restrictions on freedom of movement"; penalizing those viewed as illegal entrants without regard to the circumstances of flight in each individual case amounts to a breach of state's obligation).

The "proportionality" principle requires states to balance the potential need for detention against the effect that detention will have on each particular detainee. As the UNHCR has explained, proportionality "requires that a balance be struck between the importance of respecting the rights to liberty and security of person and freedom of movement, and the public policy objectives of limiting or denying these rights." UNHCR Detention Guidelines, ¶ 34. The principle also requires the state to balance the need for detention against the effect that detention will have on an individual detainee. *See* HRC General Comment No. 35, ¶ 18 (the individualized assessment should "take into account the effect of the detention on [an immigrant's] physical or mental health"). As detention becomes prolonged and a detainee's right to liberty is increasingly burdened, a heightened showing is needed to justify detention. *See* UNHCR Detention Guidelines, ¶ 44 ("The length of detention

can render an otherwise lawful decision to detain disproportionate and, therefore, arbitrary.")

Assessing reasonableness, necessity and proportionality requires an individualized assessment of the unique circumstances concerning each non-citizen detainee. *See Velez Loor v. Panama*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 171 (Nov. 23, 2010); Inter-Am. Comm'n H.R., Rep. on Terrorism and Human Rights, OEA/Ser/L/V/II.116, doc. 5, rev. 1 corr., ¶ 409 (Oct. 22, 2002). For that reason, the Human Rights Committee has repeatedly found that a non-citizen's detention was arbitrary under Article 9(1) of the ICCPR where the state failed to justify the detention in light of the detainee's particular circumstances. In *Kwok Yin Fong v. Australia*, for example, the Human Rights Committee concluded that Australia had violated Article 9(1) of the ICCPR where it put forward only "general reasons" to justify the prolonged detention of a non-citizen and failed to justify the detention based on "grounds particular to her case." *Fong v. Australia*, Communication No. 1442/2005, U.N. Human Rights Comm., ¶ 9.3, U.N. Doc. CCPR/C/97/D/1442/2005 (Nov. 23, 2009). Similarly, the Committee has found a violation of Article 9(1) where the state tried to justify an asylum seeker's prolonged detention on the ground that its "general experience" was that "asylum seekers abscond if not retained in custody." *Shafiq v. Australia*, Communication No. 1324/2004, U.N. Human Rights Comm., ¶ 7.3, U.N. Doc. CCPR/C/88/D/1324/2004 (Nov. 13, 2006).

The Government's interpretation of the INA is at odds with the United States' obligation to assess on a

case-by-case basis whether an individual non-citizen's detention is reasonable, necessary and proportionate.[9]

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[9] The government contends that the only mechanism available to arriving asylum seekers to secure release from detention is through DHS's parole authority. Pet'rs Br. at 18. Various reports indicate that U.S. Immigration and Customs Enforcement's (ICE) detention and parole decisions for "arriving asylum seekers" have in many cases been inconsistent, arbitrary, and/or not actually based on assessments of the particular individual's circumstances, finding for instance that: ICE parole decisions for "arriving asylum seekers" often fail to actually involve assessments of the necessity of detention in each particular individual's case; ICE officers often fail to parole asylum seekers who meet the criteria detailed in ICE's own parole directive applicable to "arriving asylum seekers"; and these problems have worsened in recent years. *See* Human Rights First, *Lifeline on Lockdown: Increased U.S. Detention of Asylum Seekers* 1-3, 13-19 (2016) [hereinafter "HRF Report"] (describing failures to follow and inconsistencies in applying asylum parole policies now and in the past); Human Rights First, *Detention of Asylum Seekers in Georgia* (2016) [hereinafter "Georgia Report"] (describing near moratorium on parole for asylum seekers held in detention facilities located in Georgia); 1 U.S. Comm'n on Int'l Religious Freedom, *Report on Asylum Seekers in Expedited Removal* 60-62 (2005) (finding, based on statistical analysis of government data, that asylum parole guidelines for "arriving" asylum seekers were "not being consistently applied" and that asylum seekers in some parts of the country were routinely released while asylum seekers in other parts of the country were rarely paroled).

As these reports indicate, in many cases parole decisions are not actually based on an individualized assessment, but instead on factors such as the availability of bed space in detention facilities, local ICE detention policies, and/or a desire to deter other asylum seekers from seeking asylum in the United States. *See* Georgia Report at 1, 4; HRF Report at 2-3, 14-17, 22-24, 30-31; *see also* U.S. Comm'n on Int'l Religious

B. Periodic Review Is Necessary to Ensure That Detention Does Not Become Arbitrary Over Time

The prohibition against arbitrary detention also requires that any detention decision be subject to periodic review. This is necessary because considerations of reasonableness, necessity and proportionality may change over time as detention becomes increasingly prolonged. As the Human Rights Committee has said, "every decision to keep a person in detention should be open to review periodically so that the grounds justifying detention can be assessed." *A v. Australia*, ¶ 9.4; *accord*

Freedom, *Barriers to Protection* 47-48 (2016) (parole bond rates reported based on availability of detention beds).

In July 2016, Human Rights First reported that arriving asylum seekers are denied parole and continue to be held in detention in some cases based on the fact that they initially arrived at a U.S. port of entry; in other cases officers have denied parole based on unexplained assertions that asylum seekers constitute a "flight risk" even when they have presented evidence of family or other community ties, or based on purported failures to sufficiently establish identity even when they have submitted considerable documentation establishing their identities. *See* HRF Report at 2-3, 13-19, 20-22. ICE acts in effect as "judge and jailer" in the absence of immigration court custody hearings, which the Government asserts are blocked by regulation. *See* 8 C.F.R. § 1003.19(h)(2)(i)(B); *see also* HRF Report at 23; Inter-Am. Comm'n H.R., Rep. on Immigration in the United States: Detention and Due Process, ¶ 137, OEA/Ser.L/V/II Doc. 78/10 (Dec. 30 2010) [hereinafter "Inter-American Commission 2010 Report"]. Such deficiencies, coupled with the lack of access to immigration court custody hearings, lead to the detention of many asylum seekers for prolonged periods of time that are not reasonable, necessary or proportionate. *See* HRF Report at 2, 23-24.

Neptune v. Haiti, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 180, ¶ 108 (May 6, 2008) (states "must periodically assess whether the reasons and purposes that justified the deprivation of liberty remain, whether the preventive measure is still absolutely necessary to achieve these purposes, and whether it is proportionate"); HRC General Comment No. 35, ¶ 18 (stating that the determination that detention is justified as reasonable, necessary and proportionate "must be subject to periodic re-evaluation and judicial review"); Office of the U.N. High Comm'r on Human Rights, Recommended Principles and Guidelines on Human Rights at International Borders, U.N. Doc. A/69/CRP. 1, at 19 (July 23, 2014) (states should "periodically review the necessity and proportionality of continued detention").

Periodic review is necessary to prevent arbitrary detention since "detention should not continue beyond the period for which the State can provide appropriate justification." *A v. Australia*, ¶ 9.4; *accord* HRC General Comment No. 35, ¶ 12 ("[T]he decision to keep a person in any form of detention is arbitrary if it is not subject to periodic re-evaluation of the justification for continuing the detention."); Rapporteur's 2012 Report, ¶ 21. Without periodic review, states would be unable to meet their obligation to ensure that "detention does not last longer than absolutely necessary." *See* HRC General Comment No. 35, ¶ 15.

The UN Human Rights Committee has specifically expressed concern that the United States' use of mandatory detention that results in non-citizens being detained "for prolonged periods of time without regard to the individual case" raises

concerns under Article 9 of the ICCPR. U.N. Human Rights Comm., Concluding Observations on the Fourth Periodic Report of the United States of America, U.N. Doc. CCPR/C/USA/CO/4, ¶ 15 (Apr. 23, 2014).

The Government carries the burden of providing "appropriate justification" for continued detention and ensuring that detention does not last longer than necessary. *See A v. Australia*, ¶ 9.4. As the U.N. Working Group on Arbitrary Detention has explained, government authorities "shall establish" that "detention is justified in accordance with the principles of necessity, reasonableness and proportionality." U.N. Working Grp. on Arbitrary Det., Rep. of the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/30/37, ¶ 83 (July 6, 2015); *accord* UNHCR Detention Guidelines, ¶ 47(v) ("The burden of proof to establish the lawfulness of the detention rests on the authorities in question.").

The Government's interpretation of the INA disregards the United States' obligation under the ICCPR to provide for periodic review of detention to ensure that it remains reasonable, necessary and proportionate under the particular circumstances applicable to each non-citizen detainee.

III. The United States Has an Obligation Under the ICCPR and International Law to Provide Court Review of All Detentions

Under international law, the Government is required to provide all asylum seekers and other non-citizens with court review of the propriety of their detention. ICCPR Article 9(4) provides:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

This "important guarantee" applies "to all persons deprived of liberty," including those in immigration detention. HRC General Comment No. 35, ¶¶ 4, 40; *accord* HRC General Comment No. 31, ¶ 10 (stating that Covenant rights must be available "to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons"); HRC General Comment No. 15, ¶ 2 (stating that the rights espoused in the ICCPR "must be guaranteed without discrimination between citizens and aliens"). Similarly, the American Declaration provides in Article XXV that "[e]very individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court." American Declaration art. XXV; *see also* American Convention art. 7 ("Anyone who is deprived of his liberty shall be entitled to recourse to a competent court."); Inter-Am. Comm'n H.R. Res. 1/08, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, at Principle III(1) (Mar. 13, 2008).[10]

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[10] *See also* Convention on Migrants' Rights art. 16(8); Convention on Children's Rights art. 37(d); African Charter art. 7; European Convention art. 5(4).

The right of detainees to court review of their detention is binding on the United States both through the ICCPR and also under widely-recognized norms of customary international law. *See* U.N. Working Grp. on Arbitrary Det., Rep. of the Working Group on Arbitrary Detention, U.N. Doc. WGAD/CRP.1/2015, ¶ 19 (May 4, 2015) [hereinafter May 2015 Arbitrary Detention Report][11]; *id.* ¶ 19 n.35 ("The right to bring such proceedings before a court is well enshrined in treaty law and customary international law."). This is a "self-standing human right, the absence of which constitutes a human rights violation." *Id.* ¶ 2.

The review proceedings guaranteed by the ICCPR and customary international law must be conducted by a court that is independent of the detaining authority. *See id.* ¶ 69 (the reviewing court "must be

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[11] The Working Group on Arbitrary Detention, established by the former Commission on Human Rights, is charged by the U.N. Human Rights Council with, *inter alia*, investigating deprivations of liberty imposed inconsistently with international standards. U.N. Human Rights Comm., Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, U.N. Doc. E/CN.4/1992/20 (Jan. 21, 1992). The May 2015 Arbitrary Detention Report is the result of the Human Rights Council's request that the Working Group draft principles and guidelines related to the rights of detainees "with the aim of assisting Member States in fulfilling their obligation to avoid arbitrary deprivation of liberty in compliance with international human rights law." U.N. Human Rights Council Res. 20/16, U.N. Doc. A/HRC/RES/20/16, ¶ 10 (July 17, 2012). The basic principles and guidelines set out in the May 2015 Arbitrary Detention Report thus represent a distillation of "international standards and recognized good practice" regarding the right to take court proceedings to challenge detentions. May 2015 Arbitrary Detention Report, ¶ 7.

a different body from the one that ordered the detention"); UNHCR Detention Guidelines, ¶ 47(iii) ("[T]he reviewing body must be independent of the initial detention authority, and possess the power to order release or to vary any conditions of release."). Article 9(4) of the ICCPR requires proceedings before "a court." ICCPR art. 9(4). The U.N. Human Rights Committee has explained that Article 9(4) "envisages that the legality of detention will be determined by a court so as to ensure a higher degree of objectivity and independence in such control." *Torres v. Finland*, Communication No. 291/1988, U.N. Human Rights Comm., ¶ 7.2, U.N. Doc. CCPR/C/38/D/291/1988 (Apr. 2, 1990) [hereinafter *Torres v. Finland*]; *accord* G.A. Res. 43/173, Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (Dec. 9, 1988) (defining "judicial or other authority" as a court "whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence").[12]

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[12] The Government contends that U.S. immigration courts are blocked by regulation from holding custody hearings for so-called "arriving" asylum seekers, and that their only mechanism for securing release is for the detaining authority to decide to release them on parole, leaving ICE effectively as "judge and jailer." Pet'rs Br. at 18. U.S. immigration courts are part of the Department of Justice, *see* 8 C.F.R. § 1003.10(a) (immigration judges appointed by Attorney General and serve within DOJ's Executive Office for Immigration Review), which is a separate agency from the detaining authority (ICE is a part of the Department of Homeland Security). In those categories of cases in which immigration courts are currently permitted to conduct custody hearings, they do have the authority to order release from detention, though that authority has at times been limited. While U.S. immigration courts do not fall within the judicial branch of the U.S. government, given the current U.S.

Moreover, the reviewing court must have the authority to order release. *See A v. Australia*, ¶ 9.5 (stating that court review under ICCPR art. 9(4) "must include the possibility of ordering release"); May 2015 Arbitrary Detention Report, ¶ 27 (court must "bear the full characteristics of a competent, independent and impartial judicial authority capable of exercising recognizable judicial powers, including the power to order immediate release if the detention is found to be arbitrary or unlawful").

ICCPR Article 9(4) and customary international law also require that court review of detention occur "without delay." *See* ICCPR art. 9(4); May 2015 Arbitrary Detention Report, ¶ 80 ("[N]o substantial waiting period shall exist before a detainee can bring a first challenge to the arbitrariness and lawfulness of detention.");[13] *see also Torres v. Finland*, ¶ 7.2 (finding detention of immigrant in violation of ICCPR Article 9(4) where "no challenge could have been made until the second week of detention"); *Tibi v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 134 (Sept. 7, 2004) (delay of 21 days before petitioner obtained a ruling on lawfulness of detention was "clearly an excessive

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system, and the fact that the immigration courts already provide custody hearings to many detained immigrants, access to immigration court custody hearings should at a bare minimum be available to all immigration detainees.

[13] *See also* Convention on Migrants' Rights art. 16(8) (requiring court review "without delay"); American Convention art. 7(6) (requiring court review "without delay"); European Convention art. 5(4) (guaranteeing right to have lawfulness of detention "decided speedily by a court").

time" in violation of American Convention Article 7(6)).

Court review of detention must also be provided periodically or regularly, as detention extends in time and becomes more prolonged. *See* HRC General Comment No. 35, ¶ 18 (detention "must be subject to periodic re-evaluation and judicial review"); *id.* ¶ 15 (referencing need for "regular review by a court or other tribunal" of administrative detentions); May 2015 Arbitrary Detention Report, ¶ 61 (non-nationals should have access to "regular periodic reviews of their detention to ensure it remains necessary, proportional, lawful and non-arbitrary"); *id.* ¶ 82 (individual entitled to take proceedings to a court again "after an appropriate period of time has passed, depending on the nature of the relevant circumstances"); *id.* ¶ 104(b) (court is empowered to "consider whether the detention remains justified, or whether release is warranted in light of all the changing circumstances of the detained individual's case"); UNHCR Detention Guidelines, ¶ 47(iv) ("[F]ollowing the initial review of detention, regular periodic reviews of the necessity for the continuation of detention before a court or an independent body must be in place."); *see also Neptune v. Haiti*, ¶ 108 (judges "must periodically assess whether the reasons and purposes that justified the deprivation of liberty remain").

The system the Government advocates—in which immigrants are detained for prolonged periods on the decision of USCBP and ICE officers without even an immigration court custody hearing—is at odds with

these requirements.[14] The U.N. Special Rapporteur on the human rights of migrants stated in 2008 that the U.S. Government "should ensure that the decision to detain a non-citizen is promptly assessed by an independent court," and that "immigration detainees are given the chance to have their custody reviewed in a hearing before an immigration judge." Rep. of the Special Rapporteur on the Human Rights of Migrants, ¶¶ 122, 123, U.N. Doc. A/HRC/7/12/Add.2 (Mar. 5, 2008). The Inter-American Commission on Human Rights, in its 2010 report on the U.S. immigration detention system, recommended that U.S. detention determinations be conducted on a case-by-case basis, subject to judicial review, and that immigrants be permitted to appeal detention decisions to an immigration court. Inter-American Commission 2010 Report, ¶¶ 429, 431. In its preliminary findings from its 2016 visit to the United States, the U.N. Working Group on Arbitrary Detention stated that "[i]ndividualised review should comply with procedural requirements of international law, including: the requirement that the State bear the burden of proof to demonstrate that it has a legitimate interest in detention, the provision of automatic and periodic bond hearings,

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[14] Paradoxically, while the Government in this case argues that those who present themselves to U.S. officers at a formal point of entry should be deprived of court review, there is no dispute that those who avoid a formal port of entry and cross the border have access to immigration court custody hearings under *In re X-K-*, 23 I & N Dec. 731 (B.I.A. May 4, 2005). While the availability of a custody hearing may have no impact on an individual's decisions regarding approach to the U.S. border, the provision of access to court review would, if anything, encourage individuals to report to formal U.S. entry points rather than avoiding them and crossing the border elsewhere.

and the requirement that immigration judges consider the accrued length of detention in deciding whether to release an individual." U.N. Working Grp. on Arbitrary Det., Preliminary Findings from Its Visit to the United States of America (Oct. 24, 2016), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20746&LangID=E.

The Government argues that the only avenue for challenging immigration detentions should be habeas corpus review. Pet'rs Br. 46-50. While Article 9(4) clearly requires access to habeas corpus, the theoretical existence of habeas, as it operates in the U.S. system, does not suffice in and of itself to meet the requirements of U.S. obligations under international law. Access to, and the scope of, habeas is limited in the United States and wait times for resolution of such petitions are lengthy. As such, habeas petitions in the U.S. system are not an avenue for prompt review of the necessity, proportionality and reasonableness of detention. Moreover, legal representation rates are exceedingly low for immigration detainees, and pro bono legal representation for indigent immigration detainees is scarce. *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Penn. L. Rev. 1 (2015) (Study found after collecting data from over 1.2 million deportation cases decided between 2007 and 2012 that 14% of detained immigrants were able to secure representation and only 2% of immigrants obtained *pro bono* representation). Habeas review is also often subject to administrative exhaustion requirements that pose additional obstacles to court access.

Thus, while a petition for habeas review is one way for a detainee to challenge his detention before an independent court within the U.S. judiciary, the United States must provide more process for asylum seekers and immigrants in order to meet its treaty commitments and the obligations of applicable international law. Indeed, the Government's position, that asylum seekers and immigrants who have been held in immigration detention by the United States for six months, and often longer, should be denied access to immigration court custody hearings, would conflict with U.S. human rights commitments.

CONCLUSION

For the reasons set forth above, this Court should affirm the Court of Appeals' decision in this case.

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v.

ALEJANDRO RODRIGUEZ, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF PROFESSORS STEPHEN H. LEGOMSKY AND STEPHEN YALE-LOEHR AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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In the Supreme Court of the United States

No. 15-1204

DAVID JENNINGS, ET AL., PETITIONERS,

v.

ALEJANDRO RODRIGUEZ, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF PROFESSORS STEPHEN H. LEGOMSKY AND STEPHEN YALE-LOEHR AS AMICI CURIAE IN SUPPORT OF RESPONDENT

Amici respectfully submit this brief to the Court in support of Respondent.[1]

INTEREST OF AMICI CURIAE

Amici curiae Stephen H. Legomsky and Stephen W. Yale-Loehr are law professors and experienced practitioners in the area of immigration law. Professor Legomsky is the John S. Lehmann University Professor Emeritus, Washington University School of Law.

[1] The parties have filed blanket consent to the filing of amicus curiae briefs. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Professor Yale-Loehr is a Professor of Immigration Law Practice, Cornell Law School.[2] Additional information about each amicus is set forth in the Appendix.

Between them, amici have decades of experience in this area, in both private practice and senior positions in government, including as Chief Counsel of U.S. Citizenship and Immigration Services and Senior Counselor to the Secretary of Homeland Security, as well as teaching, writing, and practicing immigration law. Amici have a professional interest in ensuring that the court is fully informed of the relevant statutes, regulations, and practical application of the same to various categories of aliens.

Amici submit this brief to explain the statutory framework on which the government and respondents rely, as well as the application of the same. In particular, this brief explains how various aliens are categorized under the statutes and how the Respondent Class members fit into this framework, including when and how they may be detained and the limited avenues currently available for review of detention decisions.

INTRODUCTION AND SUMMARY

The Government has the authority to detain certain categories of aliens pending the start or completion of removal proceedings. In certain circumstances, detention is mandatory; in others, it is discretionary. The present case concerns how long such detention may continue without periodic review of the appropriateness of that detention. This amicus brief focuses specifically on the statutory provisions under which Class

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[2] Institutional affiliations are provided for identification purposes only.

Members have been detained: 8 U.S.C. 1225(b), 1226(a), and 1226(c).[3]

As explained below, the statutes provide specific procedural protections with respect to removal. The statutes generally do not, however, explicitly address the permissibility of prolonged detention pending the outcomes of removal proceedings, which in practice are often lengthy. The brief also describes the bond hearing process.

Under the statutes, the variables that govern detention decisions include: (1) whether the alien was detained while trying to enter the United States or while already within the country, (2) whether the alien has been convicted of a qualifying crime, and (3) the basis the alien cites for entering or remaining in the United States. Certain elements, however, are common to all the current detention practices under these provisions.

First, detention is often the effective default condition. This is true even where, for example, an alien has sought asylum and the asylum officer determines in the preliminary interview that the alien possesses a credible fear of persecution. See pp. 6-11, *infra*. Similarly, an alien who claims a right to enter the country, including one who possesses an entry visa duly issued by the appropriate U.S. consulate, but who cannot demon-

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[3] The Class as defined by the district court and adopted by the Ninth Circuit consists of noncitizens who "(1) are or were detained for longer than six months pursuant to one of the general immigration detention statutes pending completion of removal proceedings, including judicial review, (2) are not and have not been detained pursuant to a national security detention statute, and (3) have not been afforded a hearing to determine whether their detention is justified." Pet. App. 5a-6a. The class excludes detainees who have received final orders of removal.

strate that she is "clearly and beyond a doubt" entitled to enter, shall be detained while the claim is evaluated. 8 U.S.C. 1225(b)(2)(A); see pp. 11-12, *infra*.[4]

Second, these statutory provisions do not specify the permissible length of detention. As a result, aliens are frequently detained for prolonged periods with no review of the need to continue their detention.

Third, there is generally no explicit statutory provision for ongoing review of the appropriateness of the detention.

The framework described below governs whether and under what terms aliens may be, and have been, detained—sometimes for extended periods—while their right to be admitted into or remain in the United States is being adjudicated.

The Court's questions of counsel during the oral argument in this case reflect the complexity of the statutes and the degree to which the questions presented in this case may turn, in part, on the operation of these statutes and the related proceedings. For example, Justice Sotomayor asked about the statutory authority for holding an alien found near the border. Tr. 7. Justice Kennedy asked about the standard of proof for demonstrating public danger and flight risk. *Id.* at 6-7. Justice Breyer asked whether the opportunity for aliens claiming a right to live in the United States to re-

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[4] The respondents assert that aliens who present themselves at the border are detained under Section 1225(b) for only the brief period before removal proceedings commence, and thereafter are entitled to the procedures governing detention under Section 1226(a). Resp. Br. 43-47. However, the petitioner disagrees and maintains that such individuals are not entitled to bond hearings during removal proceedings. *Id.* at 5-7.

ceive a bond hearing depends on where they are found. *Id.* at 40-41. These questions are addressed herein.

The limited opportunities for review of detention and the often lengthy or even indefinite duration of detention make it important for this Court to mark out the constitutional limits.

ARGUMENT

Parts I and II of this brief address two groups of aliens. Part I explains the statutory grounds for detaining aliens who present themselves at United States ports of entry and are subsequently detained under Section 1225(b). This group includes aliens seeking asylum and those who are not subject to expedited removal because they possess required entry documents and are not suspected of fraud, but whom an immigration officer determines are "not clearly and beyond a doubt entitled to be admitted." 8 U.S.C. 1225(b)(2)(A). Part I further describes the limited means by which these aliens may be granted release from detention or have their detention reviewed.

Part II addresses aliens apprehended while present in the United States. This group includes aliens who were never admitted, as well as those who were once admitted but have become subject to removal and are detained under Sections 1225(b) or 1226(a). It also includes aliens who have been convicted of qualifying crimes and are detained under Section 1226(c). Part II further describes the limited availability of bond hearings for some members of these subgroups.

Part III of the brief details the bond hearing process available to certain aliens. This Part also summarizes circuit court rulings that have resulted in aliens in

some jurisdictions receiving bond hearings after prolonged detention.

I. ALIENS ARRIVING IN THE UNITED STATES AT A PORT OF ENTRY

Some of the aliens included in the Section 1225(b) subclass are individuals who arrived at a U.S. port of entry seeking admission to the United States. These individuals have not been admitted but claim that they should be, because they either (i) demonstrate a credible fear of persecution if they were to return to their home countries, or (ii) claim to satisfy the statutory criteria for admission despite being unable to readily demonstrate that right to the satisfaction of the immigration officer.[5]

A. Arriving Asylum Seekers Are Detained Under Color Of Section 1225(b)(1)(B)(ii), Even After An Asylum Officer Has Found A Credible Fear Of Persecution[6]

The Section 1225(b) subclass includes aliens who arrive at a U.S. port of entry, seek asylum, and succeed in demonstrating a credible fear of persecution. The respondent treats such aliens as detained under Section 1225(b)(1)(B)(ii) while awaiting the final asylum determinations during their removal proceedings. They do

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[5] An arriving alien who either lacks valid entry documents or is suspected of fraud, and who does not claim asylum and demonstrate credible fear of persecution, is subject to "expedited removal." 8 U.S.C. 1225(b)(1)(A)(i). These individuals are not part of the class in this case.

[6] Detention is also mandatory while the credible fear determination is pending or after a finding of no credible fear, 8 U.S.C. 1225(b)(1)(B)(iii)(IV), but those individuals are not part of the present class.

not receive any review of the likelihood that their claims will succeed or the amounts of time for which they have been detained.

1. Asylum seekers detained under Section 1225(b)(1)(B)(ii) have limited opportunity for review of detention or release

If an alien is present at a U.S. port of entry and is subject to expedited removal because of a lack of entry documents or suspected fraud, and indicates to an asylum officer that she wishes to apply for asylum or that she has a fear of persecution, the immigration officer is required to detain the alien and refer her for an interview by an asylum officer. 8 U.S.C. 1225(b)(1)(A)(ii) and (B)(iii)(IV). Typically, an asylum officer will interview the asylum seeker within a few days of the referral. The interview is a screening mechanism. Its purpose is to determine whether the person has a "credible fear of persecution," 8 U.SC. 1225(b)(1)(B)(iii)(IV), defined as a "significant possibility * * * that the alien could establish eligibility for asylum," 8 U.S.C. 1225(b)(1)(B)(v).

If the asylum officer finds that the alien lacks credible fear, the alien must be detained until removed. 8 U.S.C. 1225(b)(1)(B)(iii)(IV). If, however, as is relevant to the present class members, the asylum officer finds that the alien has a credible fear, the alien remains detained for further consideration of the asylum application under Section 1225(b)(1)(B)(ii) ("If the officer determines at the time of the interview that an alien has a credible fear of persecution * * *, the alien shall

be detained for further consideration of the application for asylum.").[7]

A detained alien seeking asylum may be paroled on a case-by-case basis for "urgent humanitarian reasons" or "significant public benefit." 8 C.F.R. 212.5(b); see J.A. 46.[8] This parole is at the discretion of the Secretary of Homeland Security (though, in practice, decisions are made by Detention and Removal Operations Field Office personnel) and cannot be overturned by an Immigration Judge (IJ) or court. 8 U.S.C. 1225(a)(2)(B)(ii).

A detained alien, including an asylum seeker, may also file a habeas corpus petition in federal court. *Zadvydas* v. *Davis*, 533 U.S. 678, 687, 720-721 (2001) (citing 28 U.S.C. 2241(c)(3)). While a district court does not have jurisdiction to review most of the discretionary actions of the Secretary of Homeland Security,[9] the courts can hear challenges to the constitutionality of an alien's detention. See *Baez* v. *Bureau of Immigration & Customs Enforcement*, 150 F. App'x 311, 312 (5th Cir. 2005); see also *Boumediene* v. *Bush*, 553 U.S. 723, 747 (2008) (reviewing the history of the writ and finding that historically aliens were provided habeas relief)); see generally *Marczak* v. *Greene*, 971 F.2d 510, 518

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[7] After the commencement of removal proceedings detention is governed by Section 1226(a). See 8 C.F.R. 1236.1.

[8] In some instances, parole may not be granted without "compelling reasons in the public interest." See 8 U.S.C. 1182(d)(5)(B).

[9] Under the Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135, § 1517 (Nov. 25, 2002), statutory references to the Attorney General should be read as if they referred to the Secretary of Homeland Security whenever, as here, the relevant function has been transferred to the Secretary.

(10th Cir. 1992) (collecting cases and finding that the director must articulate "some individualized facially legitimate and bona fide reason for denying parole").

Apart from the relief granted by the Ninth Circuit in this case, subclass members seeking asylum in removal proceedings have no other avenues to challenge their detention pending determination of their application for asylum and ultimate resolution of the removal proceeding. Thus, these individuals are frequently detained indefinitely even after demonstrating a credible fear of persecution.

2. Aliens seeking asylum may be detained for lengthy periods

The Ninth Circuit recognized that "Section 1225(b) subclass members have been detained for as long as 831 days, and for an average of 346 days each." Pet. App. 40a. That statistic includes aliens seeking asylum, as well as those who were never subject to expedited removal because they possess valid entry documents and raise no suspicion of fraud.

There are examples of still longer detentions. In one habeas case, *Nadarajah* v. *Gonzales*, the plaintiff fled to the United States in October 2001 after enduring repeated torture in Sri Lanka. 443 F.3d 1069, 1072-1073 (9th Cir. 2006). When he arrived, he applied for asylum, withholding of removal, and protection under the Convention Against Torture. *Id.* at 1073. His first removal proceeding began in November 2001, and, after the government obtained two continuances, culminated with a hearing in April 2003 at which the IJ granted asylum. *Ibid.* The government then moved to re-open the removal proceedings, the IJ denied the motion, and the government appealed to the Board of Im-

migration Appeals (BIA). *Ibid.* The BIA remanded the case, and a second hearing was held in June and August 2004, at which time the IJ reinstated his order granting asylum. *Id.* at 1073-1075. The government again appealed to the BIA. *Id.* at 1075. Still detained, plaintiff sought and was denied discretionary parole under Section 1182(d)(5)(A). *Ibid.* Plaintiff then filed a habeas petition, which the district court denied in late 2005, more than one year after filing. *Ibid.* In January 2006, the BIA affirmed the IJ's decision granting asylum, but the plaintiff still remained detained because the BIA took the unusual step of referring the case to the Attorney General. *Ibid.* Finally, in March 2006, the Ninth Circuit ordered his release. *Id.* at 1084. It said: "[T]he government continues to detain [the plaintiff], who has now been imprisoned for almost five years despite having prevailed at every administrative level of review and who has never been charged with any crime." *Id.* at 1071.

Another alien arrived at a U.S. port of entry seeking asylum, the day after he had witnessed the murder of his twin brother by the Chihuahua State Police and after having been kidnapped and beaten by the same murderers. He was detained for 26 months. *Maldonado* v. *Macias*, 150 F. Supp. 3d 788, 809 (W.D. Tex. 2015). He had requested and been granted several continuances to better prepare his case, but the court found that the continuances had amounted to only a "small fraction of the length of Petitioner's current detention." *Ibid.* Other delays stemmed from an appeal to the BIA and subsequent remand after a finding that the "Immigration Judge did not adequately consider" certain facts, including whether state police could be considered government-sponsored. *Id.* at 792. The district

court granted the writ in part, ordering that petitioner receive a bond hearing. *Id.* at 812 ("[T]his Court finds that a bond hearing before an Immigration Judge is more appropriate than release in this case 'to provide a minimal procedural safeguard.'"). See also *Ahad* v. *Lowe*, No. 16-CV-01864, 2017 WL 66829, at *1-2 (M.D. Pa. Jan. 6, 2017) (granting habeas relief insofar as petitioner, detained 20 months while his asylum claim proceeded, sought an individualized bond hearing).

B. Arriving Aliens Who Are Not Subject To Expedited Removal, But Are Not "Clearly And Beyond A Doubt Entitled To Be Admitted," Are Detained Under Color Of Section 1225(b)(2)(A)

The Section 1225(b) subclass also includes aliens who arrived at a U.S. port of entry and are not subject to expedited removal because they possess valid entry documents and are not suspected of fraud, but have not satisfied the immigration inspector that they are "clearly and beyond a doubt entitled to be admitted." These individuals are detained under Section 1225(b)(2)(A). As is the case for arriving asylum seekers, the statute does not provide an opportunity to challenge the appropriateness of detention, irrespective of the likelihood that their claim will succeed or the length of their detention, although here too habeas is a possibility.[10]

Judicial records of challenges show that detention of this subclass of aliens can be equally prolonged—

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[10] These individuals may, in certain circumstances, also be released under discretionary parole by the Secretary of Homeland Security pursuant to Section 1182(d)(5). See J.A. 44.

consistent with the average of 346 days each. Pet. App. 40a. This point applies, with some exceptions,[11] even to lawful permanent residents returning from temporary visits abroad.[12] For example, in *Bautista* v. *Sabol*, a lawful permanent resident returned from a trip to the Dominican Republic and was detained by U.S. Immigration and Customs Enforcement (ICE) based on an old criminal conviction. 862 F. Supp. 2d 375, 377 (M.D. Pa. 2012). Through a habeas petition, he was released after 26 months.

That such detained aliens and other similarly situated may be detained for such lengthy periods reflects the limited avenues available to them. Although the Section 1225(b) subclass includes individuals seeking asylum (including where a preliminary interview finds the alien possesses a credible fear of persecution) and individuals unable to demonstrate their admissibility (including some lawful permanent residents), this subclass is provided with no opportunity for formal review of their detention.

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[11] Under 8 U.S.C. 1101(a)(13)(C), certain returning lawful permanent residents are treated as not seeking admission.

[12] It may even apply when the question in dispute is whether the person is a U.S. citizen. Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 Va. J. Soc. Pol'y & L. 606, 608, 628-629 (2011) (stating that "data suggests that in 2010 well over 4,000 U.S. citizens were detained or deported as aliens, raising the total since 2003 to more than 20,000" which results from the fact that "individuals in ICE custody who are U.S. citizens but have not had their claims legally recognized at first inspection are impossible to distinguish from noncitizens making false claims to U.S. citizenship").

II. ALIENS APPREHENDED IN THE UNITED STATES

In general, aliens already present in the United States who are apprehended by immigration officers may fall into three categories: (1) those who have not been convicted of specified crimes but whom the immigration inspectors believe to be removable on other grounds; (2) those who have been convicted of specified crimes that are grounds for removal; and (3) those who have final orders of removal that have not been judicially stayed.[13] All three categories are subject to detention, but only for the first group does the statute guarantee a bond hearing and the possibility of a review of the appropriateness of detention while a decision on removal is pending.

A. Aliens Apprehended In The United States But Not Convicted Of A Qualifying Crime May Be Detained And Are Only Sometimes Permitted A Bond Hearing Pending A Removal Decision

An alien apprehended in the United States is generally detained pending a decision whether to initiate removal proceedings. This includes aliens who have been legally admitted but are nonetheless deemed removable, 8 U.S.C. 1226(a), as well as those who have not been admitted but are found within the country (*i.e.*, did not appear at a United States port of entry), 8 U.S.C. 1225(b)(2)(A). A decision on whether an alien is deportable and, if so, whether she is eligible for and deserving of discretionary relief, is ordinarily made in removal proceedings under Section 1229(a). Once those

[13] Only the first two categories are included in the class in this case. See note 3, *supra*.

proceedings commence, detention is governed by Section 1226.[14] See 8 C.F.R. 1236.1(b)(1). Under that provision, the Secretary of Homeland Security has the discretion to detain, release on bond, or release on "conditional parole" (*i.e.*, without bond), unless the person has been convicted of specified crimes, in which case detention is mandatory under Section 1226(c), discussed below.[15]

Unlike other categories of aliens discussed herein, those detained under Section 1226(a) are provided, by statute, an opportunity for a bond hearing. Before being granted release under Section 1226(a), an alien must demonstrate that his release would pose neither a danger to property or persons nor a risk she would not appear for future proceedings. 8 C.F.R. 236.1(c)(8); see *In re Guerra*, 24 I. & N. Dec. 37, 38 (B.I.A. 2006) (also stating that the noncitizen must show that he does not present a "threat to the national security").[16] The alien must make this showing to be released on either conditional parole or bond.

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[14] As noted above, petitioner views individuals who arrived at the border as detained under Section 1225 even after removal proceedings have commenced.

[15] The subclass at issue in this case does not include aliens who are apprehended having been present in the United States for a period of fewer than 14 days *and* found within 100 air miles of the border. In such cases, "[i]f an immigration officer determines that [the] alien * * * is inadmissible * * * the officer shall order the alien removed from the United States without further hearing or review." 8 U.S.C. 1225(b)(1)(A)(i). These aliens are subject to expedited removal. See 69 Fed. Reg. 48,877, 48,880 (Aug. 11, 2004).

[16] A detailed description of the bond hearing process appears in pp. 22-23, *infra*.

Once the enforcement officials have made a bond determination under Section 1226(a), the alien may, at any time during removal proceedings, request a redetermination of his bond from an IJ. See pp. 22-28, *infra*; 8 C.F.R. 236.1(d)(1); 8 C.F.R. 1236.1(d)(1) (same). The alien may appeal the decision of the IJ to the BIA under the procedure described in governing regulations. 8 C.F.R. 236.1(d)(3)(i), 1003.38.

An alien detained pursuant to Section 1226(a) may also request a subsequent redetermination. The request must be made in writing and show "that the alien's circumstances have changed materially since the prior bond redetermination." 8 C.F.R. 1003.19(e). An alien "is not limited to only one bond reduction request." *In re Uluocha*, 20 I. & N. Dec. 133, 134 (B.I.A. 1989). Importantly, the length of detention is not considered by the IJ when evaluating whether circumstances have changed materially. Pet. App. 46a-47a; see Arg. Tr. 9.

Section 1226(a) subclass members are aliens detained in the discretion of the Secretary of Homeland Security who were not granted parole, were unsuccessful at the bond hearing stage, and have remained detained for more than six months. Lack of success at this stage can manifest in one of two ways: the alien may have been unable to demonstrate that he will not pose a danger or flight risk, or the alien may have received a bond determination but was unable to pay the amount required for release.[17] See, *e.g.*, *Prieto-Romero*

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[17] While inability to pay a bond remains restrictive in, *e.g.*, a typical criminal case, aliens detained under Section 1226(a) are not guaranteed the same expeditious resolution of interim detention status afforded to criminal defendants by the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*

v. *Clark*, 534 F.3d 1053, 1068 (9th Cir. 2008) (alien detained under Section 1226(a) for over three years, in part because of inability to pay $15,000 bond).

B. Aliens Apprehended In The United States Who Are Convicted Of A Qualifying Crime Are Subject To Mandatory Detention And Are Not Provided Opportunities For Conditional Release Except In Limited Circumstances

1. Aliens convicted of qualifying crimes are detained under Section 1226(c)

Section 1226(c) requires the government to detain certain aliens deemed either inadmissible or deportable because of specified national security concerns or convictions of certain crimes. This case concerns the latter, the application of Section 1226(c) to both admitted and non-admitted aliens who have committed certain crimes. (Such aliens, if residing in the United States, make up Respondents' "Mandatory Subclass.").[18] Examples include crimes involving moral turpitude and nearly all drug crimes, per Sections 1182(a)(2) and 1227(a)(2). The statute mandates that the Secretary of Homeland Security take into custody aliens rendered deportable under this subsection after they have served their sentences for the underlying crime(s), at which point they are detained by ICE pending removal proceedings.

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[18] Although Section 1226(c) also applies to aliens deemed "inadmissible" under 8 U.S.C. 1182(a)(2) and (3)(B), 8 U.S.C. 1226(c)(1)(A) and (D), Respondents' Mandatory Subclass "consists of individuals *residing in the United States*," Resp. Br. 2 (emphasis added), therefore amici do not provide further detail regarding this subset of aliens.

While certain crimes that would subject an alien to detention under Section 1226(c) likely would qualify as felonies, the commission of a misdemeanor may trigger mandatory detention under the provision. See *Preap* v. *Johnson*, 831 F.3d 1193, 1195 (9th Cir. 2016) ("A broad range of crimes is covered under the mandatory detention provision [contained in 8 U.S.C. 1226(c)], from serious felonies to misdemeanor offenses involving moral turpitude and simple possession of a controlled substance."); *Munoz* v. *Tay-Taylor*, No. 12-3764 (PGS), 2012 WL 3229153, at *1 (D.N.J. Aug. 6, 2012) (observing that the alien in that case was "arrested and detained by [ICE] pursuant to 8 U.S.C. 1226(c) because of his status as a criminal alien under 8 U.S.C. 1227(a)(2)(A)(ii)" following his completed sentence of one year of probation after having pled guilty to the misdemeanor of criminal possession of a controlled substance in the seventh degree); *Monestime* v. *Reilly*, 704 F. Supp. 2d 453, 455 (S.D.N.Y. 2010) (following an arrest for disorderly conduct, alien detained by ICE, which instituted removal proceedings because alien's misdemeanors involved "attempted menacing in the second degree" and "criminal possession of stolen property in the fifth degree").

2. Aliens detained under Section 1226(c) are released from detention in only narrow circumstances

For aliens detained under Section 1226(c), there is only one circumstance in which the Secretary of Homeland Security may authorize release: when "necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major

criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation." 8 U.S.C. 1226(c)(2). Moreover, even then the government must be satisfied "that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." *Ibid.* These circumstances are much narrower than the general discretion afforded to the Secretary of Homeland Security for aliens detained under Section 1226(a). See pp. 13-16, *supra*. The Secretary's general discretionary authority to grant parole under Section 1182(d)(5)(A) also does not apply to an alien detained under this Section. See 8 C.F.R. 212.5(b), 235.3(b)(2)(iii), (b)(4) and (c); see also J.A. 44.

Relatedly, aliens detained pursuant to Section 1226(c) are not automatically afforded bond hearings to determine the necessity of their continued detention.[19] The only type of hearing that an alien held under Section 1226(c) is entitled to pursue is one challenging the basis of her detention under that statute. This is the *Joseph* hearing, named for the case from which it derives, *In re Joseph*, 22 I. & N. Dec. 799 (B.I.A. 1999).

In a *Joseph* hearing, a detainee may avoid mandatory detention by demonstrating one or more of three facts: (1) that she is not an alien, (2) that she was not convicted of the predicate crime, or (3) that DHS is substantially unlikely to establish that she is in fact

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[19] Aliens subject to Section 1226(c) may be entitled to bond hearings in certain circumstances once the duration of detention is deemed prolonged, although circuits have not arrived at a consensus on when such a point is reached. See pp. 22-23, *infra*.

subject to mandatory detention. See 22 I. & N. at 805-806; 8 C.F.R. 1003.19(h)(2)(ii).

A *Joseph* hearing does not guarantee release from detention, even if the alien prevails. "A determination in favor of an alien * * * does not lead to automatic release. It simply allows an Immigration Judge to consider the question of bond under the custody standards of" Section 1226(a). *Joseph*, 22 I. & N. Dec. at 806. The hearing also does not consider other factors, such as whether the alien poses a danger to persons or property or whether the alien presents a flight risk. *Id.* at 809. A *Joseph* hearing attacks the evidence as to whether the alien properly falls under this section of the statute, not the appropriateness of detention.

3. Aliens held under Section 1226(c) generally are detained for longer periods of time than are other aliens

Because Section 1226(c) makes detention mandatory, the affected aliens are often held for longer periods of time than their Section 1226(a) or 1225(b) counterparts. See Pet. App. 34a ("The longest-detained class member [a member of the Section 1226(c) subclass] was confined for 1,585 days and counting as of April 28, 2012, and the average subclass member faces detention for 427 days."). This is true despite the fact that the length of the aliens' sentences served for the underlying crimes is sometimes less than the amount of time spent in immigration detention afterward, and the fact that these aliens' detentions bear no relation to their

success rate in obtaining relief from removal, which can be higher than that of other detained aliens. *Ibid.*[20]

Cases from the courts of appeals offer examples of some of the more extreme lengths of time spent in detention under Section 1226(c) without the benefit of a bond hearing. In another Ninth Circuit case, *Casas-Castrillon* v. *DHS*, a lawful permanent resident was detained pursuant to Section 1226(c) for nearly seven years before winning a right to a bond hearing via a habeas petition. 535 F.3d 942, 945 (2008).

Others have experienced similarly lengthy detentions under the same statute. See, *e.g.*, *Tijani* v. *Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005) (lawful permanent resident detained for more than two and a half years); *Sopo* v. *U.S. Atty. Gen.*, 825 F.3d 1199, 1220-1221 (11th Cir. 2016) (alien held pursuant to Section 1226(c) for at least three and a half years—exceeding the prison time he served for bank fraud—in part because (i) alien refused to file new asylum application form in 2012, insisted on retrieval of his 2004 form, and requested continuances; (ii) government took months to respond to FOIA request; and (iii) case moved between IJ and BIA three times on account of reversals); *Reid* v. *Done-*

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[20] Other cases addressing this subclass of aliens evidence the same pattern. See, *e.g.*, *Sopo* v. *U.S. Atty. Gen.*, 825 F.3d 1199, 1221 (11th Cir. 2016) (alien served less than three years subject to indefinite detention under the statute, and was held for three and half years as of release on bond); *Walker* v. *Lowe*, No. 4:15cv0887, 2016 WL 6082289, at *1 (M.D. Pa. Oct. 17, 2016) (alien held for approximately three years, "far in excess of his original * * * criminal sentence," for which alien was given time served); *Monestime* v. *Reilly*, 704 F. Supp. 2d 453, 459 (S.D.N.Y. 2010) (alien arrested based on two misdemeanor convictions subject to indefinite detention under the statute).

lan, 819 F.3d 486, 501 (1st Cir. 2016) (lawful permanent resident alien detained under Section 1226(c) held for 14 months following issuance of removal order while he appealed).

C. Aliens Ordered Removed Are Generally Detained Until The Removal Order Is Executed

Under Section 1231(a), aliens with administratively final orders of removal must be detained until they are removed (unless a court of appeals has granted a stay of removal and judicial review is still pending).[21] In most cases, the alien is subject to a 90-day removal period that begins at the latest of when the removal order becomes final, a reviewing court issues its final order after having stayed removal pending judicial review, or the alien is released from detention. 8 U.S.C. 1231(a)(1)(B). The Secretary of Homeland Security has discretion to detain certain aliens beyond the 90-day removal period, such as where the alien fails to adequately arrange for departure, is considered an inadmissible or criminal alien under the statute or the Secretary determines the alien is "a risk to the community or unlikely to comply with the order of removal." 8 U.S.C. 1231(a)(6).[22] This Court addressed Section 1231(a)(6) in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001).

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[21] While respondents originally included a Section 1231(a) subclass, the court below found this subclass to be nonexistent, as none of the aliens in the present class were subject to final removal orders. See Pet. App. 51a.

[22] If, in the alternative, the removal is stayed, the court will typically hold that detention authority reverts to pre-removal status. See, *e.g.*, *Prieto-Romero* v. *Clark*, 534 F.3d 1053, 1062 (9th Cir. 2008) (finding detention authority reverts to Section 1226).

* * *

The statutory provisions applicable to aliens present in the United States provide bond hearings to only a subset of detained aliens. Subject to the case law in certain Circuit Courts of Appeals, as explained below, the result is that these individuals are frequently detained for significant periods without the possibility of a review of the appropriateness of detention.

III. The Bond Hearing Process Provides Limited Procedural Rights, Which Vary Across The Circuits

As described *supra*, the detention statutes at issue in this case provide limited opportunities for review of an alien's detention during a removal proceeding, with only Section 1226(a)(2) expressly providing for bond hearings. A majority of the courts of appeals have found that the statutes nevertheless should be read to include a bond hearing to assess the need for continued detention. This Part describes the bond hearing procedures set out in Section 1226(a), the right to a bond hearing as recognized by the courts, and the bond hearing procedures that currently apply in various circuits.

A. Aliens Detained Under Section 1226(a) Are Entitled To Bond Hearings In Certain Circumstances

For aliens detained pursuant to Section 1226(a), see discussion pp. 6-11, 13-16, *supra*, the statute provides that an alien may be released on "bond of at least $1,500" approved by the Secretary of Homeland Security or "conditional parole." 8 U.S.C. 1226(a)(2). The statute expressly provides two modes of review and release, each to be based on an assessment of whether detention is appropriate for the specific individual at

issue. Furthermore, an alien may request a redetermination as to bond or conditional release under Section 1226(a), in accordance with specific procedures.

As an initial matter, "conditional parole" under Section 1226(a) is distinct from discretionary parole available to arriving aliens under Section 1182(d)(5). See *In re Castillo-Padilla*, 25 I. & N. 257, 258 (B.I.A. 2010). While Section 1182(d)(5)(A) contemplates that the Secretary of Homeland Security may temporarily release 1225(b) subclass members "for urgent humanitarian reasons or significant public benefit," that release is in the Secretary's sole discretion and is not reviewable.

For an alien detained under Section 1226(a), seeking conditional parole or bond thereunder provides a basic form of review of detention. To be granted release on bond or conditional parole, the alien must "demonstrate to the satisfaction of the officer" that she does not present a "danger to property or persons" and "is likely to appear for any future proceeding." 8 C.F.R. 236.1(c)(8). This determination is normally made shortly after the alien is detained. See, *e.g.*, 8 C.F.R. 287.3(d). As a practical matter, the timing may create an added hurdle for a detained alien, who not only bears the burden of proof, but may also have had minimal or no opportunity to identify evidence and develop an argument.

Aliens denied bond or release at this initial determination, and who may remain in detention indefinitely, may request a redetermination hearing in front of an IJ. See 8 C.F.R. 236.1(d)(1), 1003.19(b), 1236.1(d)(1). A redetermination hearing is the clearest avenue for a detainee to secure release from custody pending a final

determination, particularly as it is subject to certain procedural protections. A redetermination hearing usually occurs within the first few months of detention. See *In re Guerra*, 24 I. & N. Dec. 37, 38 (B.I.A. 2006); but see 8 C.F.R. 236.1(d)(1) (a Section 1226(a) detainee may apply for a redetermination of custody at any point between the initial custody determination and the order of deportation).

The burden of proof at the redetermination hearing remains unchanged, and the IJ has broad discretion in deciding what factors to consider and whether to release the detainee. *In re D-J-*, 23 I. & N. Dec. 572, 581 (B.I.A. 2003) (the IJ "may (but is not required to) grant release under [§ 236.1]" if the alien meets his or her burden of proof). IJs often consider factors such as whether the alien has a fixed address in the United States, the length of residence in the United States, family ties in the United States, employment history, immigration record, attempts to escape authority, failures to appear for scheduled court proceedings and whether the individual has a criminal record.[23] See *Guerra*, 24 I. & N. Dec. at 40. Criminal history does not necessarily justify a denial of bond or parole on the basis of dangerousness. See *Singh* v. *Holder*, 638 F.3d 1196, 1206 (9th Cir. 2011); cf. *Ngo* v. *INS*, 192 F.3d 390, 398 (3d Cir. 1999) ("[P]resenting danger to the community at one point by committing [a] crime does not place them forever beyond redemption."). See also *Guerrero Sanchez* v. *Sabol*, No. 1:15-CV-2423, 2016 WL 7426129, at *5 (M.D. Pa. Dec. 23, 2016) ("Importantly, the bond

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[23] U.S. Dep't of Justice, Exec. Office for Immig. Rev., *Introductory Guide: Bond* (2016), https://www.justice.gov/eoir/file/830231/download.

hearing a section 1226 detainee receives must be 'individualized.' Mechanistic reliance on factors that are common to all section 1226 detainees will not suffice." (internal citations omitted)).

Aliens who remain detained following an initial redetermination hearing may seek a subsequent redetermination or appeal the decision to the BIA.[24] 8 C.F.R. 236.1(d)(3)(i), 1003.19(e)-(f). However, a request for a subsequent hearing "shall be considered only upon a showing that the alien's circumstances have changed materially since the prior bond redetermination." 8 C.F.R. 1003.19(e); *In re Uluocha*, 20 I. & N. Dec. 133, 134 (B.I.A. 1989). Additional time spent in detention is not, in the government's view, a "changed circumstance," no matter how long the detention. Pet. App. 46a-47a; see Arg. Tr. 9. Accordingly, in many cases, subsequent redetermination hearings are unlikely to serve as a significant check on lengthy detention.

The structure of these hearings, including hearing procedures, the presence of counsel, the information available to the parties, and an alien's ability to exercise his or her rights under the statute, may significantly influence the outcome. In many instances, these factors result in continued detention.

Hearing Procedures. Hearings entail "informal procedures." *In re Chirinos*, 16 I. & N. Dec. 276, 277

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[24] An appeal of the IJ's bond redetermination must be made within 30 days of the decision date. 8 C.F.R. 236.1(d)(3), 1003.38(b). An IJ may grant a bond redetermination request for a new hearing even if a previous bond redetermination has been appealed to the BIA. *In re Valles-Perez*, 21 I. & N. Dec. 769, 772 (B.I.A. 1997). If a bond redetermination is granted while a bond appeal is pending, the appeal is rendered moot. *Id.* at 733.

(B.I.A. 1977). Detainees may appear in person or by video. *Ibid*; 8 C.F.R. 1003.25(c) (stating that an IJ may "conduct [immigration] hearings through video conference to the same extent as he or she may conduct hearings in person"). If the detainee is represented by counsel, the attorney will typically be in the courtroom while the detainee appears by video. As one indication of the informal nature of the proceedings, the detainee has no right to a transcript. *Chirinos*, 16 I. & N. Dec. at 277.

Representation by and Presence of Counsel. During the hearing, the government is represented by an ICE attorney. Detainees may be represented by counsel but are not guaranteed or provided counsel. 8 U.S.C. 1362. In practice, the vast majority of detained aliens proceed pro se.[25] Even where the alien may have been able to procure counsel, the realities of lengthy detention, the remote locations of detention facilities, and possible short-notice transfers across various facilities may effectively limit a detainee's access to coun-

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[25] See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa L. Rev. 1, 40, 75 (2015) (providing data showing that 86 percent of detainees were unrepresented in hearings).

sel.[25]

Information Available to the Parties. During the bond hearing, each side has the opportunity to present evidence and witnesses. Formal rules of evidence do not apply. *Baliza* v. *INS*, 709 F.2d 1231, 1233 (9th Cir. 1983). The government frequently has a wide range of information at its disposal. For example, the government can readily access criminal records using fingerprints or biometrics. The government also has the alien's "A file," containing information about prior immigration filings and proceedings, as well as any filings in the instant case, such as the alien's I-213 form, a record created by the immigration official taking the alien into custody, which includes personal information and immigration history. At least one circuit has held that administrative documents such as the I-213 are "presumptively reliable administrative document[s]," *Gutierrez-Berdin* v. *Holder*, 618 F.3d 647, 653 (7th Cir. 2010), although the information therein may not have

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[25] See Dora Schriro, U.S. Immigration & Customs Enforcement, *Immigration Detention Overview and Recommendations*, 24 (Oct. 2009), https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf (recommending that detainees represented by counsel not be transferred outside the area unless there are health or safety concerns); see also Human Rights Watch, *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States* 43 (2009), https://www.hrw.org/sites/default/files/reports/us1209webwcover.pdf (indicating that detainee transfer can seriously impact detainees' access to counsel).

been subject to verification.[27] The government also has access to background checks and certain information elicited in prior proceedings (*e.g.*, during the credible fear screening).

Facts Concerning Detention. In addition, the government may point to, and the IJ may rely on, information concerning the alien's detention, including specifics of the detainee's behavior in detention.

Unless the detainee is transferred, she will likely appear before the same immigration judge, who will be familiar with the case. See Amicus Br. of Nine Retired Immigration Judges 22 (asserting that, after six months, the judge will have background information on the alien's claims and will be able to assess the alien's credibility).

B. Federal Courts Have Held That Aliens Detained Under Sections 1225(b), 1226(a), And 1226(c) Are Entitled To Bond Hearings When Detention Becomes Prolonged

Six United States Courts of Appeals provide de-

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[27] "[A]bsent any evidence that a Form I-213 contains information that is inaccurate or obtained by coercion or duress," the document is relied upon even without verification. *In re Gomez-Gomez*, 23 I. & N. Dec. 522, 524 (B.I.A. 2002). See, *e.g.*, *In re Barcenas*, 19 I. & N. Dec. 609, 611 (B.I.A. 1988) (the BIA found that the I-213 was properly admitted although immigration officer relied upon information provided by a noncitizen, who was suspected of being untruthful and could not provide verifying documents); *In re Aracely Del Carmen Mendoza-Robles*, No. A095 724 672, 2015 WL 5180619, at *2 (B.I.A. Aug. 11, 2015) (The BIA held that an I-213 was reliable even though it contained hearsay, the secretary who obtained the information for the "Background Information Form" was later fired for theft, and DHS relied upon counsel's admissions on behalf of noncitizen in filling out the form.).

tained aliens bond hearings if and when their detention becomes "prolonged." Hearings for prolonged detention are available, in different circumstances, to aliens detained under Sections 1225(b), 1226(a) and 1226(c). With the limited exception of bond redetermination hearings available to aliens detained under Section 1226(a), the bond hearings described in this section represent the only opportunity for many class members to challenge prolonged detention.[28]

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[28] Although an alien held in detention may request an expedited case review, such review is unlikely to change the processing time. Under current ICE policy, cases of detained aliens are already prioritized. U.S. Dep't of Justice, Exec. Office for Immig. Rev., *Revised Docketing Practices Relating to Certain EOIR Priority Cases* (Feb. 3, 2016), https://www.justice.gov/eoir/file/819736/download; see also U.S. Dep't of Justice, Exec. Office for Immig. Rev., *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (prioritizing aliens subject to detention, including those convicted of a felony or apprehended while trying to enter the United States, and directing enforcement resources towards prioritized aliens). Despite this policy, there is a growing backlog and these detentions may stretch on for years. See Pet. App. 40a. The detainee's other option is to concede removability and agree to deportation. Given the current backlog, aliens can and do opt to waive their rights to minimize their time in detention, losing the chance to adjudicate their immigration case. See Jennifer Lee Koh et al., *Deportation Without Due Process*, 6-8 (2011), https://www.nilc.org/wp-content/uploads/2016/02/Deportation-Without-Due-Process-2011-09.pdf (detailing that the majority of individuals who accept stipulated removal are behind bars).

1. The Ninth and Second Circuits provide for bond hearings for aliens detained over six months

The Ninth Circuit, in the case below, held that aliens detained under Sections 1225(b), 1226(a) and 1226(c) are entitled to bond hearings after six months of detention. See Pet. App. 61a-100a; *id.* at 2a-59a. The opinion below followed earlier Ninth Circuit cases, including *Casas-Castrillon* v. *DHS*, 535 F.3d. 942 (2008). In that case, the same court reasoned that Section 1226(c) was intended to govern aliens only during "'brief' detention," not lengthy detention (in that case, nearly seven years), without some form of procedural protections for the detained. *Id.* at 950. The court found that once the BIA affirms the removal order, the government's authority to hold the alien is based in Section 1226(a), which requires a bond hearing. *Id.* at 951; Pet. App. 71a-72a. Furthermore, prolonged detention under either Section raises "serious constitutional concerns." Pet. App. 83a.

The Second Circuit adopted the Ninth Circuit's interpretation for Section 1226(c) detainees, holding that "mandatory detention [of Section 1226(c) detainees] for longer than six months without a bond hearing affronts due process." *Lora* v. *Shanahan*, 804 F.3d 601, 606 (9th Cir. 2015), cert. denied, 136 S. Ct. 2494 (2016). The same interpretation has been adopted by district courts in detentions under Section 1226(a) and in detentions under Section 1225(b), although these issues remain unresolved in the Second Circuit. See *Aria* v. *Aviles*, No. 15-CV-9249 (RA), 2016 WL 3906738, at *4 (S.D.N.Y. July 14, 2016), appeal filed, No. 16-3186 (2d Cir. Sept. 12, 2016); *Saleem* v. *Shanahan*, No. 16-CV-808 (RA), 2016 WL 4435246, at *3 (S.D.N.Y. Aug. 22,

2016), appeal filed, No. 16-3587 (2d Cir. Oct. 21, 2016); see also *William* v. *Aviles*, No. 15-CV-4009, 2015 WL 7181444, at *3 (S.D.N.Y. Oct. 30, 2015), appeal filed, No. 15-4166 (2d Cir. Dec. 30, 2015); but see *Perez* v. *Aviles*, 188 F. Supp. 3d 328, 332 (S.D.N.Y. 2016) (holding that *Lora* does not apply to aliens detained under Section 1225(b)); *Cardona* v. *Nalls-Castillo*, 177 F. Supp. 3d 815, 816 (S.D.N.Y. 2016) (same).

2. The First, Third, Sixth and Eleventh Circuits provide for bond hearings on a case-by-case basis

The First, Third, and Eleventh Circuits have held that Section 1226(c), requiring the Secretary of Homeland Security to take into custody certain aliens, "implicitly authorizes detention for a reasonable amount of time," after which an individualized review of detention is necessary. *Diop* v. *ICE/Homeland Sec.*, 656 F.3d 221, 231 (3d Cir. 2011); *Sopo* v. *U.S. Atty. Gen.*, 825 F.3d 1199, 1214 (11th Cir. 2016); see *Reid* v. *Donelan*, 819 F.3d 486, 498-499 (1st Cir. 2016) (holding that, in determining whether continued detention is unreasonable, "the district court must evaluate whether the alien's continued detention sufficiently serves the categorical purpose of the statute"). Similarly, the Sixth Circuit has held that when an alien's removal is not foreseeable, the alien may not be held in detention for an unreasonable period without a "government showing of a 'strong special justification,' constituting more than a threat to the community, that overbalances the alien's liberty interest." *Ly* v. *Hansen*, 351 F.3d 263, 273 (2003) (citing *Zadvydas*, 533 U.S. 678, 690 (2001)); see *Dvorkin* v. *Gonzales*, 173 F. App'x 420, 424 (2006) (acknowledging *Ly*'s holding that "detention pursuant to § 1226 must be reasonable").

Unlike the Second and Ninth Circuits, these circuits have declined to adopt a bright-line test for determining the point at which detention is considered prolonged. See, *e.g.*, *Sopo*, 825 F. 3d at 1215. The First, Third, Sixth and Eleventh Circuits have also limited their holdings to individuals held under 1226(c).

3. Bond hearings based on prolonged detention are procedurally similar to Section 1226(a) bond hearings

Circuits that provide bond hearings for aliens subject to prolonged detention have largely adopted the procedures of Section 1226(a), with a few significant exceptions.

First, in this case the Ninth Circuit required that the Immigration Judge consider the length of detention in bond hearings after prolonged detention. Pet. App. 56a.[29]

Second, the Ninth, Second, and Third Circuits have shifted the burden of proof in prolonged detention hearings from the alien to the government. *Lora*, 804 F.3d at 616; *Singh*, 638 F.3d at 1203; *Diop*, 656 F. 3d at 233. In the Ninth and Second Circuits the government must carry this burden by establishing by "clear and convincing evidence" that the alien "poses a risk of flight or a risk of danger to the community." *Lora*, 804 F.3d at 616; *Singh*, 638 F.3d at 1203.

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[29] In addition, in the Ninth Circuit, a detainee in prolonged detention bonds hearings may receive a transcript or audio recording of the hearing to aid in appeal. See *Singh*, 638 F.3d at 1208 (citing *Mathews* v. *Eldridge*, 424 U.S. 319 (1976)).

Both the Eleventh and First Circuits have kept the burden on the alien. The Eleventh Circuit has held that an alien detained under Section 1226(c) "carries the burden of proof and must show that he is not a flight risk or danger to others." *Sopo*, 825 F. 3d at 1220. The First Circuit has affirmed district court holdings that "aliens detained under § 1226(a) [bear] the burden of proof at their bond hearings, and 'individuals who commit[] a § 1226(c) predicate offense should not receive *more* protections than § 1226(a) detainees.'" *Reid*, 819 F.3d at 492. No other circuit has ruled on this issue.

In short, while the statutes at issue provide limited opportunities for review of an alien's detention, these courts of appeals have read these statutes to include a bond hearing, although the applicable procedures vary.

CONCLUSION

As described above, the government may detain aliens, and in certain circumstances must do so, under several interrelated statutory authorities. While the specific provisions vary, driven largely by the circumstances of the alien's apprehension and any claimed grounds for remaining in the United States, they possess certain shared elements. The statutory provisions are generally silent on the length of detention, parole or review of detention is discretionary and infrequent, and for many detainees there is no explicit provision for a bond or equivalent hearing. Even in the limited circumstances where bond hearings are available, those hearing are conducted under procedures that may put the detained alien at a disadvantage. The result is frequently extensive and prolonged detention for large numbers of aliens while they await the outcomes of

their removal proceedings, with few opportunities for review of the continued necessity of that detention, as the class members' lengthy detentions attest.

Respectfully submitted,

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APPENDIX

APPENDIX

Dr. Stephen H. Legomsky is the John S. Lehmann University Professor Emeritus at the Washington University School of Law in St. Louis. Professor Legomsky took a leave of absence from 2011 to 2013 to serve as Chief Counsel of U.S. Citizenship and Immigration Services, the immigration services agency in the Department of Homeland Security. After retiring in July 2015, he returned to Washington to serve as Senior Counselor to the Secretary of Homeland Security. He has testified before Congress many times while in the private sector, most recently in 2015 before both the House and the Senate Judiciary Committees on the legality of President Obama's immigration executive actions. He has served as a consultant to the transition teams of Presidents Clinton and Obama, the first President Bush's Commissioner of Immigration, the U.N. High Commissioner for Refugees, and several foreign governments, on immigration and refugee policies. His latest book, Immigration and Refugee Law and Policy (co-authored starting with the fifth edition, and now in its sixth edition), has been the required text at 185 law schools since its inception. His other books, published by the Oxford University Press, include Immigration and the Judiciary—Law and Politics in Britain and America, and Specialized Justice. Professor Legomsky is the founding director of the law school's Whitney R. Harris World Law Institute. A former actuary, he graduated first in his class at the University of San Diego School of Law (Day Division) before earning the degree of Doctor of Philosophy from Oxford University. He clerked for the U.S. Court of Appeals for the Ninth Circuit and headed a division of the Ninth Circuit central legal staff. He has won several awards, includ-

ing the American Immigration Lawyers Association's annual award, given to one immigration law professor in the United States, and Washington University's Arthur Holly Compton Award, given annually to one university faculty member for career accomplishments. An elected member of the American Law Institute, he founded and chaired the Immigration Law Section of the Association of American Law Schools and has chaired the American Immigration Lawyers Association's Law Professor's Committee and the Refugee Committee of the American Branch of the International Law Association. Professor Legomsky has been appointed to visiting positions at Oxford University, Cambridge University, and other universities in the United States, Mexico, New Zealand, Switzerland, Germany, Italy, Austria, Australia, Suriname, Singapore, Israel, and Portugal. In the past three years he has appeared several times on the PBS News Hour, NPR, Al Jazeera, foreign national news broadcasts, and several local NPR and other stations, and has been quoted in the NY Times, the Wall Street Journal, the Washington Post, CNN, USA Today, US News & World Report, Voice of America, Huffington Post, Politico, ABC News, NBC news, the Los Angeles Times, Associated Press, Reuters, Bloomberg News, the National Law Journal, and other major news outlets.

Stephen Yale-Loehr has practiced immigration law for 35 years. He is co-author of Immigration Law and Procedure, the leading 21-volume treatise on U.S. immigration law. U.S. federal courts have cited the treatise more than 500 times. He also teaches immigration and asylum law at Cornell Law School as Professor of Immigration Practice and is of counsel at Miller Mayer in Ithaca, New York.

Mr. Yale-Loehr received his B.A. degree from Cornell University in 1977 and his J.D. cum laude from Cornell Law School in 1981. He was editor-in-chief of the Cornell International Law Journal. After graduation, Mr. Yale-Loehr clerked for the Chief Judge of the Northern District of New York.

From 1982 to 1986 Mr. Yale-Loehr practiced international trade and immigration law at a large law firm in Washington, D.C. From 1986 to 1994 he was managing editor of Interpreter Releases and executive editor of Immigration Briefings, two leading immigration law publications.

Mr. Yale-Loehr is the coauthor or editor of many books, including Green Card Stories; America's Challenge: Domestic Security, Civil Liberties and National Unity After September 11; Balancing Interests: Rethinking the Selection of Skilled Immigrants; Global Business Immigration Practice Guide; J Visa Guidebook; Understanding the Immigration Act of 1990; Understanding the 1986 Immigration Law, and numerous law review articles.

Mr. Yale-Loehr is a member of the New York bar and the U.S. Supreme Court. He is a non-resident Fellow at the Migration Policy Institute in Washington, DC. He chairs the asylum committee of the American Immigration Lawyers Association (AILA).

Mr. Yale-Loehr is annually listed in Chambers Global, Chambers USA, and An International Who's Who of Corporate Immigration Lawyers as one of the best immigration lawyers in the world. He is listed in Who's Who in America. He is frequently quoted in the press on immigration issues and has often testified before Congress. He is the 2001 recipient of AILA's Elmer

Fried Award for excellence in teaching and the 2004 recipient of AILA's Edith Lowenstein Award for excellence in advancing the practice of immigration law.

RECORD
AND
BRIEF

Supreme Court, U.S.
FILED
OCT 24 2016
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No. 15-1204

In the Supreme Court of the United States

DAVID JENNINGS, *ET AL.*,

Petitioners,

v.

ALEJANDRO RODRIGUEZ, *ET AL.*,
INDIVIDUALLY AND ON BEHALF OF ALL
OTHERS SIMILARLY SITUATED,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, PRETRIAL JUSTICE INSTITUTE, CENTER FOR LEGAL AND EVIDENCE-BASED PRACTICES, AND JUDGE DAVID L. BAZELON CENTER IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers (the "NACDL"), the Pretrial Justice Institute (the "PJI"), the Center for Legal and Evidence-Based Practices (the "CLEBP"), and the Judge David L. Bazelon Center for Mental Health Law (the "Bazelon Center").[1]

- The NACDL is a non-profit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, it has a nationwide membership of many thousands of direct members, and up to 40,000 including affiliates. The NACDL's mission is to ensure justice and due process for the accused and to promote the proper and fair administration of justice.
- The PJI is a national organization working to advance safe, fair, and effective pretrial justice that honors and protects all people. Since the 1970s, the PJI has worked to advance knowledge and practice in criminal justice through research, demonstration projects, and technical assistance, with a special focus on the fairness and efficacy of pretrial justice.
- The CLEBP is a non-profit corporation that has worked with jurisdictions across the country to

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[1] No counsel for any party authored this brief in whole or in part. No person or entity, other than the *amici curiae* and their members, made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners and Respondents consented to the filing of this brief.

improve the administration of their bail systems. The CLEBP's mission is to improve bail systems across the country by promoting rational, fair, and transparent legal and evidence-based pretrial practices to achieve safer and more equitable communities as well as cost-effective government.

- The Bazelon Center, founded in 1972 as the Mental Health Law Project, is a national non-profit advocacy organization that provides legal assistance to individuals with mental disabilities. Through litigation, public policy advocacy, training and education, the Bazelon Center works to advance the rights and dignity of individuals with mental disabilities in all aspects of life.

The *amici curiae* have been leading advocates on behalf of individuals who have been subjected to detention by the government. Consistent with their respective missions, the *amici curiae* have devoted their resources to ensuring that all individuals deprived of liberty—including the hundreds of thousands of non-citizens who are detained as part of the immigration process—receive the full protections of the law.

SUMMARY OF ARGUMENT

The immigration system is an outlier among comparable detention regimes because it fails to provide safeguards required under well-settled principles of due process. The Ninth Circuit's decision rectified this anomaly and brought the protections of the immigration detention system closer in line with those provided in the pretrial justice and civil

commitment regimes. Affirmance of the Ninth Circuit's decision is warranted for the reasons stated in the Respondents' brief. The *amici curiae* respectfully submit this brief to highlight two additional considerations supporting affirmation.

First, the protections the Ninth Circuit ordered for non-citizens subjected to prolonged immigration detention accord with those routinely provided in the pretrial and civil commitment detention schemes in the federal system and the fifty states. The statutes and case law governing these analogous civil detention contexts regularly require automatic hearings at which the government bears the burden of justifying civil detention, by clear and convincing evidence. The civil detention case law also recognizes that the longer an individual spends in detention, the greater the deprivation of liberty that the individual suffers. In the pretrial context, this concern is mitigated by requirements that individuals be brought to trial within strict time limits. In the civil commitment context, this concern is ameliorated by mandatory periodic hearings to ensure that a person is not detained for any longer than necessary. These laws thus support the Ninth Circuit's requirement of periodic hearings for class members detained past six months, as well as its requirement that the length of past detention be considered at such hearings.

Second, the experiences of state pretrial justice systems demonstrate that granting a hearing and other basic safeguards to non-citizens subjected to prolonged detention would not undermine the government's interest in preventing flight or crime. Recent studies of evidence-based practices demonstrate that actuarial risk assessment tools can help judicial officers make far

more informed evaluations of an individual's likelihood of failing to appear for court or committing new criminal offenses. Many individuals with past convictions—such as class members subject to detention under 8 U.S.C. § 1226(c)—have low rates of criminal activity and high rates of appearance for court proceedings. Detention in such circumstances is unnecessary.

ARGUMENT

This case concerns the statutory and due process rights of non-citizens subject to prolonged detention by the government under 8 U.S.C. §§ 1225(b), 1226(a), and 1226(c). The Ninth Circuit construed these immigration statutes to require that class members detained for a prolonged period during the pendency of removal proceedings have a right to (1) an automatic bond hearing at which (2) the government must prove the need for detention by clear and convincing evidence, and (3) additional periodic hearings at which the immigration judge must take into account the length of past detention in evaluating the necessity of continued detention. The *amici curiae* submit that the Ninth Circuit's decision was consistent with this Court's civil detention jurisprudence, and brings the immigration detention system closer in line with the pretrial detention and civil commitment laws of the federal government and the fifty states. Moreover, the experiences of those states show that the protections provided would not, as Petitioners fear, jeopardize the efficient and safe operation of the immigration process.

This Court has specifically relied on precedent from the pretrial and civil commitment contexts in determining due process standards applicable to immigration detention. *See Zadvydas v. Davis*, 533

U.S. 678, 690 (2001) (relying on pretrial justice and civil commitment case law in evaluating civil detention of non-citizens). In addition, this Court often looks for a consensus among jurisdictions to support its due process jurisprudence. *See, e.g., Addington v. Texas*, 441 U.S. 418, 426 (1979) (rejecting preponderance standard for involuntary commitment in part based on near unanimity of laws governing legal standard in commitment); *Jackson v. Indiana*, 406 U.S. 715, 732-35 (1972) (surveying laws to determine whether due process barred indefinite commitment of criminal defendant due to incompetency).

Here, the federal government and the states are in accord: the government's ability to deprive an individual of liberty through civil detention must be conditioned on rigorous procedural protections to ensure that such detention comports with the government's interests in detention, particularly when detention becomes prolonged. The following procedural safeguards, which the Ninth Circuit mandated in prolonged detention proceedings, are routinely—and often universally—afforded detainees in the pretrial and civil commitment systems:

1. **Automatic Hearings**: The federal government and all fifty states are in accord that an individual subject to pretrial detention or civil commitment must be granted an automatic hearing (*i.e.*, one not conditioned on the individual's request) on the necessity of such detention. *See infra* Argument § I.B. Specifically, in the pretrial system, a criminal defendant may only be detained after a hearing before a judge tied to whether the individual is a danger to the community or a flight risk. *See infra id.* Likewise, in civil commitment systems, an individual detained based

on a purported mental illness and dangerousness is entitled to a hearing before a judicial officer to determine if there is sufficient justification for commitment. *See infra id.*

2. **Heightened Burden of Proof:** At pretrial detention hearings in the criminal justice system, the government routinely must prove by clear and convincing evidence that the defendant poses a danger to the community or a risk of flight. *See infra* Argument § I.C. Likewise, the federal government and the states unanimously require the government to prove by, at least, clear and convincing evidence that an individual meets the substantive requirements for civil commitment to justify so serious a deprivation of liberty. *See infra id.*

3. **Periodic Hearings and Consideration of Length of Prior Detention:** Federal and state case law uniformly recognize that, when detention increases in duration, it imposes a more severe deprivation of liberty. In the federal and state pretrial justice systems, the practical maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act, state law analogues, and the Sixth Amendment right to a speedy trial. *See infra* Argument § I.D. The absence of any such comparable limits to the length of immigration proceedings makes periodic review of immigration detention crucial to prevent unjustifiably prolonged detention. *See Demore v. Kim*, 538 U.S. 510, 531 (2003) (affirming detention only for a "limited period" during removal proceedings). Respondents' expert found that class members' median length of detention was approximately one year. *See* Joint App'x 71-73. In contrast, the duration of pretrial detention for criminal

defendants is carefully limited by protections such as the Speedy Trial Act—which sets a default deadline of seventy days from information or indictment to trial, *see* 18 U.S.C. § 1361(c) (2012)—and its state law analogues. *See infra* Argument § I.D. In the civil commitment context, the concern of unnecessarily prolonged detention is ameliorated by a strict requirement that individuals be granted periodic review of their involuntary commitments because detention cannot continue for any longer than necessary to achieve the purpose for which an individual was committed. *See infra id.*

* * *

These protections are particularly important during prolonged immigration detention because the government does not recognize a right to appointed counsel in removal proceedings. In the absence of automatic bond hearings and the other protections required by the Ninth Circuit, it is likely (as the record in this case demonstrates) that non-citizens will suffer months or years of needless detention while their challenges to removal are resolved, often successfully.[2]

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[2] Numerous studies demonstrate the wide disparity in outcomes between immigrants with and without legal representation. *See, e.g.*, Ingrid Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 2 (2015) (finding that fourteen percent of detained immigrants secured representation and that represented detainees were fifteen times more likely to seek relief from removal and 5.5 times more likely to obtain relief); New York Immigrant Representation Study, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings* 3 (2011) (finding that represented immigrants were six times more likely to secure relief from removal).

The *amici curiae* submit that adopting these protections would not lead to the dire consequences predicted by Petitioners. On the contrary, numerous studies in the pretrial detention context demonstrate that evidence-based statistical risk assessment instruments can guide judicial officers in deciding whether to release a defendant during the pretrial phase. These mechanisms help ensure that detention is only imposed when truly necessary to address concerns about flight or criminal activity.

I. The Federal Government And The States Routinely Guarantee Individuals Subject To Pretrial Detention And Civil Commitment Safeguards Consistent With Those Mandated By The Ninth Circuit.

The protections that the Ninth Circuit ordered for prolonged immigration detention are widely provided to pretrial detainees and individuals subject to civil commitment.

A. The Pretrial Detention and Civil Commitment Laws Provide Significant Protections Consistent With the Requirements of Due Process.

"Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690. The government violates that right unless the detention is reasonably related to its purpose and ordered in a proceeding with "adequate procedural protections." *Id.*

Consistent with these due process principles, all the states and the District of Columbia apply a

presumption of release during the pretrial period. *See, e.g.*, National Conference of State Legislatures, *Pretrial Release Eligibility* (Mar. 2013), http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-eligibility.aspx (last visited Oct. 24, 2016); D.C. Code § 23-1321(b) (2012); *DeWolfe v. Richmond*, 76 A.3d 1019, 1033 (Md. 2013); N.C. Gen. Stat. § 15A-534(b) (2016); *see also* ABA Standards for Criminal Justice: Pretrial Release, Standard 10-1.1 at 38 (3d ed. 2007), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf (last visited Oct. 24, 2016) ("[T]he thrust of these Standards is toward release of the defendant unless there are strong reasons for detention."). Likewise, in the federal pretrial system, the Bail Reform Act of 1984 (the "Bail Reform Act"), 18 U.S.C. § 3141 (2012), *et seq.*, requires that "[i]n a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence" that detention is necessary prior to trial. *United States v. Salerno*, 481 U.S. 739, 750 (1987). Thus, in the federal system as well, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Id.* at 755.

Similarly, individuals subject to civil commitment are guaranteed due process safeguards before the state can, *e.g.*, require them to undergo treatment in hospitals or other settings. *See Addington*, 441 U.S. at 425 ("[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."); *see also O'Connor v. Donaldson*, 422 U.S. 563, 580 (1975) (Burger, C.J., concurring) ("There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an

individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law."). The states also recognize that due process requires significant protections—including a hearing at which the government must prove the need for detention by clear and convincing evidence—before a person can be civilly committed against his or her will. *See, e.g., People v. Stevens*, 761 P.2d 768, 774 (Colo. 1988) (holding that clear and convincing evidence is necessary "to justify the massive curtailment of liberty inherent in involuntary commitment"); *People v. McQuillan*, 221 N.W.2d 569, 574 (Mich. 1974) ("The United States Supreme Court has made it clear that commitment to a mental hospital is deprivation of liberty. Commitment may not be accomplished without proper notice and hearing to determine mental incompetence."); *In Interest of M.S.H.*, 466 N.W.2d 151, 152 (N.D. 1991) ("[O]ur law authorizes an involuntary commitment only if the petitioner proves by clear and convincing evidence that the respondent is a person requiring treatment[.]").

B. The Federal Government and All Fifty States Guarantee Automatic Hearings to Consider the Necessity of Pretrial Detention and Civil Commitment.

Automatic hearings to consider the government's justification for civil detention are universally required in both the pretrial detention and civil commitment regimes.

All fifty states plus the District of Columbia unanimously recognize the right to an automatic hearing at the outset of pretrial detention. *See, e.g., Thomas v. State*, 542 S.W.2d 284, 289 (Ark. 1976) ("[Arkansas Rule of Criminal Procedure 8.5] mandates

that the judicial officer hold a pretrial release inquiry upon the first appearance of an arrested person."); *Clark v. Superior Court*, 14 Cal. Rptr. 2d 49, 51 (Ct. App. 1992) ("[R]egardless of how a defendant is charged, our Constitution provides the right to a bail hearing."); Fla. Stat. § 907.041(f) (2016) ("The pretrial detention hearing shall be held within 5 days of the filing by the state attorney of a complaint to seek pretrial detention."); *Wheeler v. State*, 864 A.2d 1058, 1064 (Md. Ct. App. 2005) ("Under Maryland Rule 4-216(f), a defendant denied pretrial release by a District Court commissioner receives a review hearing conducted by a District Court judge."); *Lavallee v. Justices in the Hampden Superior Court*, 812 N.E.2d 895, 902 (Mass. 2004) ("Because a defendant's liberty, a fundamental right, is at stake at a bail hearing, the principles of procedural due process . . . are implicated. They include the right to be heard[.]"); S.C. Code Ann. § 22-5-510(B) (2016) ("A person charged with a bailable offense must have a bond hearing within twenty-four hours of his arrest[.]"); *Ex Parte Nelson*, 594 S.W.2d 67, 69 (Tex. Crim. App. 1980) ("It was error to deny bail without a hearing.").[3]

Likewise, in federal pretrial proceedings, the Bail Reform Act requires a prompt, automatic hearing to determine whether the defendant should be released or detained pending trial. *See* 18 U.S.C. § 3142(a) (2012); *see also Salerno*, 481 U.S. at 747 (citing 18 U.S.C. § 3161(c)(1) (2012)). In making this determination, the

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[3] Some states require a different governmental showing for a narrow set of charges, *e.g.*, capital offenses or treason. *See, e.g., Blount v. State*, 511 A.2d 1030, 1039 (Del. 1986). But all states require that a criminal defendant receive a hearing tied to whether the individual poses a flight risk or danger.

Bail Reform Act, as the default, mandates the release of a person pending trial unless the court finds that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community[.]" *Salerno*, 481 U.S. at 742 (quoting 18 U.S.C. § 3142(e) (2012)).

In the civil commitment context, federal law requires automatic individual commitment hearings based on the inherent constitutional protections necessary when a person's liberty is taken. *See Vitek v. Jones*, 445 U.S. 480, 495 (1980) (affirming due process right to an adversary hearing prior to involuntary transfer to a mental hospital); *see also Bailey v. Pataki*, 708 F.3d 391, 393 (2d Cir. 2013) ("[T]he constitutional principle that, absent some emergency or other exigent circumstance, an individual cannot be involuntarily committed to a psychiatric institution without . . . a predeprivation hearing [is] firmly established." (citing *Vitek*)); *see also* Michael L. Perlin, *Mental Disability Law: Civil and Criminal* tit. 1-2, § 2C-4 (2d ed. 2013) ("There is no longer any serious question as to the constitutional requirement of some kind of a judicial hearing prior to an order of involuntary civil commitment.").

Likewise, all fifty states and the District of Columbia unanimously recognize that due process requires that individuals subject to civil commitment proceedings be provided a meaningful, automatic hearing at which the state must prove the need for commitment. *See, e.g., State ex rel. Hawks v. Lazaro*, 202 S.E.2d 109, 122, 125 (W. Va. 1974) ("[L]iberty . . . is a right of the very highest nature. . . . [Therefore,] the same standards . . . are required in a commitment

hearing as would be applicable in a criminal prosecution. The subject individual . . . must be present in person and cannot waive that right.") (quotation marks omitted); *McQuillan*, 221 N.W.2d at 574 ("[C]ommitment to a mental hospital is deprivation of liberty. Commitment may not be accomplished without proper notice and hearing to determine mental incompetence."); *In re Kevin C.*, 850 A.2d 341, 344 (Me. 2004) ("Both the private and governmental interests in an involuntary commitment proceeding are substantial. [The patient] has a fundamental liberty interest at stake . . . [and] the process employed must . . . be substantial in order to ensure that risk of error associated with a commitment determination is low.").

C. The Federal Government and the States Routinely Require the Government to Bear the Burden of Justifying Pretrial Detention or Civil Commitment by Clear and Convincing Evidence.

To justify pretrial detention at a bond hearing under the Bail Reform Act, the burden of proof is on the government to show by "clear and convincing evidence" that detention is necessary because "no condition or combination of conditions will reasonably assure the safety of any other person and the community[.]" 18 U.S.C. § 3142(f) (2012). Numerous state legislatures and courts have also expressly adopted this foundational requirement and require the government to prove the need for pretrial detention by "clear and convincing evidence." *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-3961(D) (2015); *Fry v. State*, 990 N.E.2d 429, 445-46 (Ind. 2013); *State v. Stradt*, 556 N.W.2d 149, 151 (Iowa 1996); *Mendoza v. Commonwealth*, 673

N.E.2d 22, 25 (Mass. 1996); *Brill v. Gurich*, 965 P.2d 404, 408 (Okla. Ct. Crim. App. 1998).

Similarly, the Due Process Clause requires the government to present "clear and convincing evidence" before an individual can be civilly committed. *Addington*, 441 U.S. at 419-20, 433. In accordance with *Addington*, all fifty states require the government to prove the necessity of commitment by at least clear and convincing evidence to satisfy due process, and some states impose an even higher standard of proof. *See, e.g.*, *Shivaee v. Commonwealth*, 613 S.E.2d 570, 578 (Va. 2005) ("[The Supreme Court] clearly stated that the 'clear and convincing' evidentiary standard is the minimum standard that may be used in a civil commitment proceeding."); *Superintendent of Worcester State Hosp. v. Hagberg*, 372 N.E.2d 242, 246 (Mass. 1978) (holding that civil commitment requires proof beyond a reasonable doubt).

D. The Pretrial Detention and Civil Commitment Regimes Recognize the Relationship Between Length of Detention and the Gravity of the Due Process Concern.

In the federal and state pretrial justice systems, the length of pretrial detention is "limited by the stringent time limitations of the Speedy Trial Act," *Salerno*, 481 U.S. at 747 (citing 18 U.S.C. § 3161(c)(1)), its state law analogues, and the Sixth Amendment right to a speedy trial. *See Klopfer v. North Carolina*, 386 U.S. 213, 221-23 (1967); *see also* R.I. Gen. Laws § 12-13-7 (2016); Vt. Stat. Ann. tit. 13, § 7553b (2016).

And where a criminal defendant is nevertheless detained for a prolonged period, federal courts have expressly considered the length of past detention when

evaluating whether detention violates due process. *See, e.g., United States v. Orena*, 986 F.2d 628, 630 (2d Cir. 1993) (considering "length of detention" as one of the factors determining whether detention violates due process); *United States v. Hare*, 873 F.2d 796, 801 (5th Cir. 1989) ("In determining whether due process has been violated, a court must consider not only factors relevant in the initial detention decision . . . but also additional factors such as the length of the detention that has in fact occurred or may occur in the future, the non-speculative nature of future detention, the complexity of the case, and whether the strategy of one side or the other occasions the delay."); *United States v. Accetturo*, 783 F.2d 382, 388 (3d Cir. 1986) ("[A] determination under the Bail Reform Act that detention is necessary is without prejudice to a defendant petitioning for release at a subsequent time on due process grounds. . . . [T]he evidence admitted at the initial detention hearing, evaluated against the backdrop of the duration of pretrial incarceration and the causes of that duration, may no longer justify detention.").

In the civil commitment context, to ensure that detention is not unnecessarily prolonged, due process requires periodic review. This Court has expressly held that even if an individual's commitment was justified at the outset, confinement cannot continue after the basis for the confinement no longer exists. *See O'Connor*, 422 U.S. at 574-75 ("Nor is it enough that Donaldson's original confinement was founded upon a constitutionally adequate basis, if in fact it was, because even if his involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed."); *see also*

Jackson, 406 U.S. at 738 (holding that a person committed based on incapacity to stand trial "cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future").

Consistent with this Court's case law, the Supreme Courts of Connecticut and New Jersey held in two foundational cases that due process requires periodic judicial review for involuntarily committed individuals. *See Fasulo v. Arafeh*, 378 A.2d 553, 558 (Conn. 1977) ("[P]laintiffs have been denied their due process rights . . . by the state's failure to provide them with periodic judicial review of their [civil] commitments in the form of state-initiated recommitment hearings, replete with the safeguards of the initial commitment hearings, at which the state bears the burden of proving the necessity for their continued confinement."); *State v. Fields*, 390 A.2d 574, 580 (N.J. 1978) (holding that individuals indefinitely committed to mental institutions following a criminal acquittal by reason of mental disability are entitled to periodic review hearings at which the state bears the burden of justifying continued detention).

Nearly all of the other states have followed suit, with state statutes or courts requiring either a new commitment proceeding after a certain period of time or periodic review of the necessity of continued commitment, and many states require such petition or review every six months or less. *See, e.g.*, Ariz. Rev. Stat. Ann. § 36-540(F) (2015) (involuntary inpatient treatment order limited to 90, 180, or 365 days depending on patient category); Ark. Code Ann. § 20-47-215(c)(1)(A) (2016) (continued commitment beyond

180-day period requires new petition by treatment staff); Colo. Rev. Stat. § 27-65-109 (2016) (continued commitment requires petition for extension at six-month intervals); Del. Code Ann. tit. 16, § 5011 (2016) (court must convene hearing at least every three months to consider whether continued involuntary treatment is necessary); Okla. Stat. tit. 43A, § 5-420(A) (2016) (involuntary commitment must be reviewed at least once every three months); *Chavis v. Yankton Cnty.*, 654 N.W.2d 801, 804 (S.D. 2002) ("[A]n individual is entitled to periodic review hearings until such time as he or she is discharged."); D.C. Code § 21-546 (2012) (requiring consideration of need for continued commitment at least every ninety days); *see also* Perlin, *supra* § 2C-6.5c ("Since *Fasulo* and *Fields*, there has come the 'virtual demise' of indeterminate involuntary institutionalization, with over forty states providing a durational limit on commitment.").

II. Modern Pretrial Practices Demonstrate That Categorical Detention Of Individuals With A Past Conviction Is Not Necessary To Prevent Criminal Activity And Flight.

The experiences of the states demonstrate that the government may meet its interest in preventing flight risk and danger with mechanisms far less restrictive than the categorical detention of large groups of individuals. In particular, many jurisdictions now utilize empirically grounded risk assessment tools in fashioning conditions of release for the vast majority of criminal defendants in pretrial detention.

An empirically derived pretrial risk assessment tool is one that "has been demonstrated through an empirical research study to accurately sort defendants into categories showing their likelihood of having a

successful pretrial release—that is, they make all their court appearances and are not arrested on new charges." *See* Pretrial Justice Institute, *Pretrial Risk Assessment: Science Provides Guidance on Assessing Defendants* 2 (May 2015). The instruments first identify factors that have some predictive association with risk of failure to appear or committing crimes prior to trial, then assign greater or lesser weight to those factors, depending on the strength of their predictive power. *See id.* at 2-4.

One leading organization has developed a validated risk assessment tool based on a database of over 1.5 million cases drawn from approximately 300 jurisdictions across the country. Laura & John Arnold Foundation, *Public Safety Assessment: Risk Factors and Formula* 2 (2016), http://www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf (last visited Oct. 24, 2016). Other jurisdictions have developed their own risk assessment tools based on data from their respective jurisdictions. *See* Pretrial Justice Institute, *supra* at 3. These risk assessment tools have been empirically shown to accurately sort defendants into appropriate categories based on their likelihood of flight or committing criminal activity pending trial. *See id.* at 2.

The movement toward evidence-based risk assessment in the pretrial detention context has produced two important lessons for this case. First, a prior criminal conviction does not, standing alone, mean that a defendant poses a high risk of future dangerousness or flight. Second, the government is capable of developing sophisticated means of deciding which non-citizens should be detained and which should be released. Keeping broad groups of non-citizens in

prolonged immigration custody—including based solely on a past conviction—is therefore excessive in relation to the government's interests in preventing flight risk and danger.[4]

A. A Prior Criminal Conviction Alone Does Not Render an Individual a High Risk for Future Criminal Conduct or Flight.

The fundamental premise underlying much of Petitioners' arguments as to the Section 1226(c) subclass—that providing bond hearings to prolonged detainees with certain types of convictions, including certain misdemeanors, will compromise the government's interest in preventing criminal activity or flight—is undermined by significant research on pretrial detention.

Contemporary pretrial detention research shows that an individual's prior criminal conviction does not, by itself, render an individual a high risk of committing new criminal activity or failing to make court appearances. Rather, prior criminal convictions must be weighed alongside a number of other factors to determine flight risk and danger. For example, one widely respected national risk assessment tool weighs the existence of a prior conviction with other objective

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[4] The *amici curiae* do not endorse the adequacy of current bond procedures in the pretrial context as outlined in this brief. The *amici curiae* merely submit that Petitioners' stated concerns may be addressed without recourse to mandatory detention based on broad categorizations about, for example, a detainee's past convictions. Furthermore, this section only addresses whether bond hearings should be made available—and not the myriad successful alternatives to detention in both the pretrial and civil commitment contexts.

factors, including the defendant's age, in predicting both likelihood of failure to appear and committing new criminal activity. *See* Laura & John Arnold Foundation, *supra* at 2.

The pretrial detention research also indicates that the so-called "severity" of a pending charge or prior conviction—such as whether the defendant is charged with a misdemeanor or felony—has, at most, a minimal correlation with a defendant's likelihood of committing new criminal activity or failing to appear. *See, e.g., id.* at 2 (assigning equal weight to prior misdemeanor and felony convictions in assessing risk of new offense pending trial).

The pretrial detention studies show that the prolonged detention of individuals based solely on a past conviction—as with the Section 1226(c) subclass—is unnecessary. Because many—if not most—such individuals can safely be released into the community, their detention is excessive in relation to the government's interests in preventing danger and flight.

B. Risk Assessment Tools Are Available to Guide Courts in Deciding Who Should Be Released Pending Immigration Proceedings.

The experiences of state and local jurisdictions also demonstrate that the government has the capacity to develop empirically grounded risk assessment tools that would guide judicial officers in making release decisions at prolonged detention bond hearings. For example, the state of Kentucky—which the Department of Justice has recognized as a model jurisdiction in this regard—implemented risk assessment tools with significant success. *See, e.g.*, Tara Boh Klute & Mark Heyerly, Kentucky Pretrial

Services, *Report on Impact of House Bill 463: Outcomes, Challenges and Recommendations* 4-6, 10 (June 2012) (showing that during one year-period after Kentucky's adoption of statewide risk assessment tool, greater numbers of individuals were released pretrial, while pretrial success rates increased); *see also* U.S. Department of Justice, Civil Rights Div., Opinion Letter 7-8 (Mar. 14, 2016), https://www.justice.gov/crt/file/832461/download (last visited Oct. 24, 2016) (identifying Kentucky as a model jurisdiction that has enacted effective risk assessment tools).

In response to the demonstrated success of jurisdictions that have adopted contemporary risk assessment tools, a growing chorus of respected voices—including the American Bar Association, the National Conference of Chief Justices, and the U.S. Department of Justice—are urging state and local jurisdictions to adopt empirically grounded risk assessments to guide courts in making bail decisions. *See, e.g.*, ABA Standards for Criminal Justice: Pretrial Release, Standard, *supra* at 10-1.10 at 54 (recommending that criminal justice systems "establish a pretrial services agency or program to . . . present risk assessments"); National Conference of Chief Justices, Resolution 3, *Endorsing the Conference of State Court Administrators Policy Paper on Evidence-Based Pretrial Release*, http://ccj.ncsc.org/~/media/Microsites/Files/CCJ/Resolutions/01302013-pretrial-release-Endorsing-COSCA-Paper-EvidenceBased-Pretrial-Release.ashx (last visited Oct. 24, 2016) (endorsing "adoption of evidence-based assessment of risk in setting pretrial release conditions"); U.S. Dep't of Justice, Civil Rights Division, *supra* at 7 (urging state and local courts to adopt "objective risk

assessments by pretrial experts" as a superior means of making release decisions).

The government should apply these lessons to the immigration context. For instance, the Department of Homeland Security has implemented its own Risk Classification Assessment for use in the removal context, which it uses to determine which individuals should be released. *See* Mark L. Noferi & Robert Koulish, *The Immigration Detention Risk Assessment*, 29 Geo. Immigr. L.J. 45, 47-48 (2014). Although this risk assessment tool has not yet been validated for use with the immigrant detainee population (as have the risk assessment instruments discussed above) and has been criticized as wrongly biased in favor of detention, *see id.* at 76-81, the government can and should develop and apply empirically based tools to meet its interests in preventing flight and danger. Doing so will be far less expensive and more efficient than the prolonged detention of hundreds of thousands of people, while preserving our most cherished constitutional principles.

CONCLUSION

The *amici curiae* urge the Court to affirm the right of class members subjected to prolonged immigration detention to (1) an automatic bond hearing (2) where the government must show by clear and convincing evidence that further detention is justified, and (3) periodic judicial review of detention decisions in which a judicial officer must consider the duration of the individuals' past detention. These procedural protections are consistent with protections provided in the pretrial detention and civil commitment contexts, and necessary to bring the immigration detention system in line with the minimum due process

requirements in connection with the prolonged detention of thousands of people. In addition, modern, evidence-based practices in the pretrial detention context indicate that a past criminal conviction alone is not an accurate predictor of danger or flight. Thus, class members—including those in the Section 1226(c) subclass—are being subjected to needless, prolonged deprivation of liberty that bears no relation to the government's justifications for detention.

Respectfully submitted,

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Petitioners,

v.

ALEJANDRO RODRIGUEZ, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AND THE IMMIGRANT LEGAL RESOURCE CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The National Immigration Project of the National Lawyers Guild ("NLG") is a non-profit membership organization of attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and secure the fair administration of the immigration and nationality laws. For 30 years, the NLG has provided legal training to the bar and the bench on immigration consequences of criminal conduct; it also is the author of *Immigration Law and Crimes* and three other treatises. The NLG has participated as *amicus curiae* in several significant immigration-related cases before this Court. *See, e.g.*, *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015); *Vartelas v. Holder*, 132 S. Ct. 1479 (2012); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Padilla v. Kentucky*, 559 U.S. 356 (2010). Through its membership network and its litigation, the NLG is acutely aware of the problems faced by immigrants subject to prolonged mandatory detention.

The Immigrant Legal Resource Center ("ILRC") is a non-profit center and national leader in the area of the immigration consequences of criminal convictions. The ILRC has provided information and assistance to thousands of immigration advocates, criminal defenders, courts, and other groups. It has published manuals on the immigration consequences of crimes,

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* also represent that all parties have consented to the filing of this brief; letters reflecting their blanket consent to the filing of *amicus* briefs are on file with the Clerk.

and it has regularly filed *amicus* briefs in this Court in important immigration cases. *See, e.g.*, *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010). Through its work, the ILRC has developed a strong interest in the issue of mandatory detention.

INTRODUCTION AND SUMMARY

As respondents have persuasively explained, unreasonably prolonged mandatory detention raises grave constitutional concerns. *Amici* agree that the Court should avoid those concerns by limiting mandatory detention under 8 U.S.C. § 1226(c) to six months (or some other reasonable time period).[2] But the temporal limitation respondents propose is not the only construction of § 1226(c) capable of addressing the constitutional problem created by prolonged mandatory detention. As one Justice has concluded, the Court also can avoid most of the constitutional problem by limiting § 1226(c) to immigrants who lack a substantial challenge to their removability. *See Demore v. Kim*, 538 U.S. 510, 577-79 (2003) (Breyer, J., concurring in part and dissenting in part).

The statute permits such a reading. Section 1226(c) applies only to an immigrant who "is deportable" or "is inadmissible." In light of the broader statutory scheme of which § 1226(c) is a part, those terms are ambiguous in two ways. First, they could refer (as the government maintains) to immigrants whose criminal convictions subject them to a threshold finding of removability – even if they are eligible for relief that would prevent entry of a final removal order. By contrast, the same terms could refer instead to immigrants who lack any substantial

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[2] Although *amici* agree with respondents on all three questions presented, they write solely to address the second question concerning mandatory detention under § 1226(c).

argument against the entry of a final removal order. There are several textual and structural indicia that Congress used the terms "deportable" and "inadmissible" in § 1226(c) in the latter, narrower sense. And in light of the serious constitutional concerns respondents identify, the canon of constitutional avoidance compels that narrower interpretation.

The second ambiguity concerns the level of certainty required to find that someone is "deportable" or "inadmissible" for purposes of triggering mandatory detention under § 1226(c). The statute itself says nothing about that question. And, as with the first ambiguity, the canon of constitutional avoidance compels a reading of the statute that demands a high degree of certainty about immigrants' removability before subjecting them to mandatory detention.

Construing the statute to apply only to immigrants who lack any substantial defense to the entry of a removal order accords with § 1226(c)'s purpose and with the strong constitutional interests respondents identify. Most cases of prolonged detention arise because the detainee raises strong challenges to removability that require time to adjudicate. For that reason, exempting such individuals from § 1226(c)'s mandate would provide a significant check on prolonged detentions. It also would comport with § 1226(c)'s purpose: to prevent immigrants who present a heightened risk of flight or danger from reoffending or fleeing pending their removal. As the record below shows, immigrants with strong arguments against removal have strong incentives to show up to their removal hearings to litigate those defenses. Such immigrants – who tend to have less serious criminal histories and have other strong

equities in their favor – are not the type of people Congress had in mind when enacting § 1226(c).

Finally, the current process by which immigrants may challenge mandatory detention does not ameliorate the constitutional concerns created by prolonged detention. That process, which provides detainees with so-called "*Joseph* hearings,"[3] does virtually nothing to protect immigrants from erroneous mandatory detentions. With respect to the first ambiguity noted above, *Joseph* does not even permit detainees to challenge mandatory detentions on the basis that they are eligible for relief from removal. And, with respect to the second, *Joseph* places a burden of proof on immigrants so onerous that it is all but impossible for the government to lose. That burden of proof cannot be squared with immigrants' strong liberty interests in remaining free from prolonged detention. Indeed, the BIA decided *Joseph* prior to this Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), and it paid no attention to the grave constitutional interests implicated by mandatory civil detention.

Rather than rely on the unconstitutional *Joseph* process, the Court should look instead to criminal bail standards to fill the statutory gap left open by § 1226(c). *See Demore*, 538 U.S. at 578 (Breyer, J.). Those standards would provide courts with a ready set of workable criteria for determining when an immigrant possesses a substantial challenge to removability. When an immigrant raises such a challenge, § 1226(c) should not apply.

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[3] *See In re Joseph*, 22 I. & N. Dec. 799 (BIA 1999).

ARGUMENT

I. THE COURT CAN AVOID MOST OF THE CONSTITUTIONAL PROBLEM POSED BY PROLONGED MANDATORY DETENTION UNDER § 1226(c) BY LIMITING IT TO DETAINEES WHO LACK A SUBSTANTIAL ARGUMENT AGAINST THE ENTRY OF A REMOVAL ORDER

As respondents have ably shown, prolonged mandatory detention raises serious constitutional concerns. *Amici* agree that the Court should construe the statute to avoid those concerns by restricting mandatory detention to six months (or, at the very least, a reasonable time period). The Court should affirm on that basis alone. *See* Resp. Br. 34-41.

But as respondents also point out (at 21 & n.6), the Court alternatively can limit § 1226(c) to immigrants who lack a substantial argument against their removability. That reading would mostly avoid the constitutional concerns that respondents identify. *Amici* write separately to elaborate on this alternate ground for affirmance.

A. Section 1226(c) Can Be Read To Authorize Mandatory Detention Only When The Detainee Lacks A Substantial Defense To The Entry Of A Removal Order

The grave constitutional concerns respondents identify require this Court to "ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). Although respondents offer one such construction of § 1226(c), *see* Resp. Br. 34-36, there is an alternative that likewise would "avoid[]" most of the constitutional concerns raised by that provision. *Zadvydas*,

533 U.S. at 689. Specifically, § 1226(c) imposes mandatory detention if an immigrant "*is deportable* by reason of having committed" a predicate criminal offense. 8 U.S.C. § 1226(c)(1)(B), (C) (emphasis added).[4] That language raises the threshold question of when an immigrant "is deportable" for purposes of mandatory detention.

The government appears to answer that question (at 32-33) by assuming that § 1226(c) applies to all immigrants whom it charges (or could charge) as "hav[ing] committed the specified offenses" designated in § 1226(c). Under that view, once the government asserts that an immigrant has been convicted of a predicate offense, § 1226(c) applies unless the government is "substantially unlikely" to establish that the immigrant's conviction was actually for an offense that falls within a predicate category of removal listed in the statute. *In re Joseph*, 22 I. & N. Dec. 799, 800 (BIA 1999).

The statute, however, permits a different reading. As one Justice has concluded, § 1226(c) also can be read to allow an immigrant to seek release on bond so long as the immigrant has a claim that "he is not deportable" that "(1) [is] not interposed solely for purposes of delay and (2) raises a question of 'law or fact' that is not insubstantial." *Demore v. Kim*, 538

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[4] Section 1226(c) also applies to immigrants who are "*inadmissible* by reason of having committed" certain predicate offenses. 8 U.S.C. § 1226(c)(1)(A), (D) (emphasis added). The statutory arguments set forth herein apply equally to immigrants detained under this "inadmissibility" prong. *See id.* § 1229a(c)(1)(A) (providing that "[a]t the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States"); *id.* § 1229a(e)(2) (defining the term "removable" as referring to immigrants who are "inadmissible" or "deportable"). For brevity's sake, however, *amici* focus on the "is deportable" prong of § 1226(c).

U.S. 510, 578-79 (2003) (Breyer, J., concurring in part and dissenting in part). The Court now should adopt that interpretation and limit § 1226(c) to immigrants who lack a substantial argument against the entry of a removal order.

1.a. The statutory text does not require the detention of immigrants who have substantial arguments against their removability. By using the phrase "is deportable," Congress evinced an intent to cover only those immigrants against whom the entry of a removal order is fairly certain – not those who merely "may, or may not," be ordered removed. *Demore*, 538 U.S. at 578 (Breyer, J.). Indeed, § 1226(c) itself "literally say[s] nothing about an individual who, armed with a strong argument against deportability, might, or might not," be deportable. *Id.*

Such an argument against deportability can take two forms. First, detainees may have a substantial argument at the threshold that they are not properly subject to mandatory detention because their convictions are not for one of the offenses that § 1226(c) enumerates (or because they are U.S. citizens). Second, some individuals who are removable in the threshold sense may still have bases for contesting their removability as a final matter, by pursuing relief such as cancellation of removal or adjustment of status. *See* 8 U.S.C. §§ 1229b, 1255. If immigrants successfully obtain such relief, they are not removable on the basis of the charged convictions and maintain (or obtain) lawful permanent status in the United States. *See, e.g.*, Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure* § 64.04[8], at 64-44.57 (rev. ed. 2003) ("A grant of cancellation extinguishes existing grounds for removal, and they cannot be invoked

subsequently to remove the applicant.").[5] In both cases – the immigrant whose conviction was not for a qualifying offense, and the one who attains relief such as cancellation – no removal order ever issues.

Demore had no occasion to consider whether such individuals are subject to mandatory detention because the Court found that Mr. Kim did not dispute that he was "'deportable' within the meaning of § 1226(c)." *Demore*, 538 U.S. at 522.[6] This case now offers the Court an opportunity to reach that question and construe the phrase "is deportable" in a manner consistent with the "strong" "constitutional claims to bail" respondents identify. *Id.* at 577 (Breyer, J.).

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[5] *See also United States v. Gonzalez-Roque*, 301 F.3d 39, 42 n.1 (2d Cir. 2002) ("The adjustment of status procedure allows a qualifying deportable alien to change his status to that of an alien who had not committed the offense which otherwise rendered him deportable."); *In re Mascorro-Perales*, 12 I. & N. Dec. 228, 230 (BIA 1967) ("[W]hen relief has been granted . . . , it would be clearly repugnant to say that the respondent remains deportable because of the same conviction.").

[6] To be sure, Mr. Kim applied for withholding of removal and therefore did not concede that he ultimately should be removed. *Demore*, 538 U.S. at 522 n.6. But a grant of withholding does not prevent the entry of a removal order and provides no permanent right to remain in the United States. *See In re I-S- & C-S-*, 24 I. & N. Dec. 432, 434 n.3 (BIA 2008). Instead, withholding simply prohibits removal to a particular specified country for as long as conditions exist in that country threatening the immigrant with severe hardship or torture. It does not prevent removal to a third country or removal to the specified country, should conditions change. Accordingly, immigrants applying solely for withholding (which is how this Court viewed Mr. Kim) are not challenging the entry of a removal order and so are "deportable" as *Demore* appeared to have understood that term. While such immigrants no doubt retain some incentive to appear for removal proceedings, those incentives are categorically weaker than the incentives of people who have the opportunity to maintain or obtain permanent immigration status.

b. The term "is deportable," though ambiguous, may be read to encompass only individuals who lack a substantial defense to the entry of a removal order. Section 1101(a)(47) provides that an immigrant does not become "deportable" until after an immigration judge ("IJ") has entered an "order of deportation . . . concluding that the alien is deportable." 8 U.S.C. § 1101(a)(47)(A).[7] In fact, unless otherwise specified, removal proceedings – in which an IJ must "decid[e] the . . . deportability of an alien" – supply the "sole and exclusive procedure for determining whether an alien may be . . . removed from the United States." *Id.* § 1229a(a)(1)-(3). "At the conclusion" of a removal proceeding, the IJ "decide[s] whether an alien is removable," *id.* § 1229a(c)(1)(A) – that is, the IJ issues an order determining whether the immigrant is "deportable" or "inadmissible," *id.* § 1229a(e)(2)(A)-(B).

The term "is deportable" in § 1226(c) most naturally refers to immigrants who lack any substantial defense to the entry of such an order. Indeed, the contrast between § 1226(c) and § 1226a(a)(2) suggests that Congress did not intend the former to cover immigrants who possess such a defense. Section 1226a(a)(2) mandates detention for certain immigrants determined to pose national-security risks "irrespective of any relief from removal for which the alien may be eligible." Section 1226(c), by contrast, contains no such qualifier and instead applies only to immigrants who "[are] deportable." Congress's decision to omit from § 1226(c) the phrase "irrespective

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[7] A removal order becomes "final" and authorizes the immigrant's actual removal only after the BIA affirms the IJ's order, or after the time for taking an appeal to the BIA expires. 8 U.S.C. § 1101(a)(47)(B).

of any relief from removal" is strong evidence that it considered arguments for such relief relevant to the scope of that provision. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) ("At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings . . . [,] particularly . . . where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand.").

The statutory history further suggests that the term "is deportable" is ambiguous. The predecessor statute to § 1226 authorized the Attorney General to detain an immigrant "[p]ending a determination of deportability." 8 U.S.C. § 1252(a)(1) (1994). That context makes clear that Congress was using "deportability" in the sense of referring to an IJ's *final* order finding an immigrant removable. *See also id.* (referring to "such final determination of deportability"). Such a meaning, which is incompatible with the government's view that the word "deportable" can refer only to an immigrant's threshold removability, reinforces that the government's view is not the only interpretation of § 1226(c) that is "fairly possible." *Zadvydas*, 533 U.S. at 689.

To be sure, other parts of the statutory scheme show that Congress also uses the term "is deportable" in the threshold sense of describing immigrants who are merely subject to removal proceedings on the basis of conduct that renders them potentially removable on a ground designated under the statute. *See, e.g.*, 8 U.S.C. § 1227(a) (describing "classes of deportable aliens"); *id.* § 1229b(a) (authorizing the Attorney General to "cancel removal in the case of an alien who is . . . deportable"). The government

undoubtedly will argue that Congress intended the same meaning in § 1226(c). But those other provisions merely demonstrate that the term "is deportable" is ambiguous. In the face of such ambiguity, the Court should read the statute to avoid the constitutional doubts raised by the government's position. *See Zadvydas*, 533 U.S. at 689; *see also* Resp. Br. 33.

2. *Amici*'s construction of § 1226(c) also accords with the statute's purpose of "preventing deportable criminal aliens from fleeing." *Demore*, 538 U.S. at 528. Section 1226(c) reflects Congress's judgment that mandatory detention of covered immigrants provides "the best way to ensure their *successful removal* from this country." *Id.* at 521 (emphasis added). That goal is inapplicable to individuals who raise substantial challenges to their removability. Immigrants who raise such challenges are neither "already subject to deportation," *id.* at 518, nor motivated to "reoffend and flee" prior to their removal hearings, Pet. Br. 32. On the contrary: immigrants with strong defenses to removal have strong incentives to appear at their proceedings and litigate those defenses. *See Zadvydas*, 533 U.S. at 690 (calling the "justification" of "preventing flight" "weak or nonexistent where removal seems a remote possibility at best"); *cf. United States v. Castiello*, 878 F.2d 554, 555 (1st Cir. 1989) (per curiam) ("[A]s a matter of common sense, the likelihood of succeeding on appeal is relevant to flight risk.").

Nor is the mandatory detention of individuals with substantial challenges to their removability reasonably related to Congress's goal of "protecting the public from dangerous criminal aliens." *Demore*, 538 U.S. at 515. Individuals whose offenses do not actually constitute grounds for mandatory removal

have not been "convicted of one of a specified set of crimes" that Congress associated with a heightened risk of danger. *Id.* at 513. On the contrary, by enacting statutory forms of relief such as cancellation and adjustment, Congress allowed qualified individuals convicted of less-serious offenses the opportunity to reside permanently in the United States.[8] If Congress had viewed those individuals as presenting such a heightened danger to the public as to require their mandatory detention, it would not have made them eligible for permanent relief from removal.

The experience of the named plaintiff in *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015) – in which the Second Circuit joined the Ninth Circuit in limiting mandatory detention to six months – illustrates the point. Mr. Lora is a lawful permanent resident ("LPR") who lived continuously in the United States for 19 years alongside his father (also an LPR) and his mother, siblings, and fiancée (all U.S. citizens). *Id.* at 606. Based on a minor state-law conviction for third-degree cocaine possession, the government initiated removal proceedings against him. *Id.* at 606-07. Mr. Lora's controlled-substances conviction exposed him to removal proceedings, but they did not foreclose him from obtaining cancellation of removal and retaining his right to remain here permanently.

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[8] For example, eligibility for cancellation of removal is predicated on factors such as the absence of an aggravated-felony conviction and the length of ties to the community – both of which are factors that correspondingly decrease the risk of flight and danger. *See* 8 U.S.C. § 1229b(b)(1)(A), (C). Similarly, cancellation for immigrants who are not lawful permanent residents requires a showing of "good moral character," *id.* § 1229b(b)(1)(B), making it unlikely that an immigrant who qualifies for such relief could present a heightened danger to the public.

See id. at 607 (noting that "Lora now has a strong argument for cancellation of removal"). Nonetheless, because of the government's view of § 1226(c), it considered him "deportable" from the outset and subjected him to many months of mandatory detention – which ended only when a district court awarded him habeas relief. *Id.* at 607-08.

Mr. Lora is not the type of individual to whom Congress intended § 1226(c) to apply. His deep ties to this country, along with the relatively minor nature of his controlled-substances conviction, give him a substantial argument against deportability. And he has every incentive to remain peacefully integrated into society and to show up to his removal hearings to litigate his claims for relief. Indeed, the "government did not seriously dispute that Lora was neither a flight risk nor a danger to the community," and since his release on bond he has "remain[ed] gainfully employed, tied to his community and poised to contest his removability." *Id.* at 608. The government cannot credibly claim that denying individuals like Mr. Lora the opportunity to seek bond serves any legitimate immigration purpose.

B. Limiting § 1226(c) To Immigrants Who Lack A Substantial Challenge To Removability Would Address Most Of The Constitutional Concerns Respondents Identify

Amici's interpretation of the statute addresses most of the constitutional problem presented by prolonged mandatory detention. *See Demore*, 538 U.S. at 578-79 (Breyer, J.) (explaining that this interpretation "is consistent with what the Constitution demands"). *Amici*'s construction addresses the core reason that many detentions become unreasonably prolonged. Prolonged mandatory detentions do not

occur in the abstract; they typically happen to immigrants whose removal cases take a long time to litigate. And those cases generally involve substantial arguments against removal. Resp. Br. 23-25. For immigrants who lack any bona fide argument against removal, the government should be able to complete removal proceedings quickly and thereby limit any mandatory detention to the "brief period" that *Demore* upheld. 538 U.S. at 513. But when immigrants press substantial challenges to removal, their cases take longer to litigate and their detentions tend to grow unreasonably prolonged. Resp. Br. 9.

The example of Maxi Sopo, whom undersigned counsel represented before the Eleventh Circuit, offers one case in point. *See Sopo v. U.S. Att'y Gen.*, 825 F.3d 1199 (11th Cir. 2016). Mr. Sopo suffered through more than four years of mandatory detention before the Eleventh Circuit ordered the government to provide him a bond hearing. *Id.* at 1220-21. The "bulk" of the delay responsible for his lengthy detention "came from the IJ erring several times" in denying adjustment of status under 8 U.S.C. § 1159(c). *Id.* at 1221. Indeed, Mr. Sopo's removal case is now before the IJ "for a fourth round of review" after *three reversals* (two by the BIA, one by the Eleventh Circuit after the government confessed error) of the IJ's erroneous decisions. *Id.* at 1203. That experience illustrates how many prolonged detentions happen. Because Mr. Sopo's strong arguments against removal precipitated multiple rounds of successful appeals, his removal proceeding – and thus his mandatory detention – surpassed four years.

Mr. Sopo's experience is admittedly extreme, but it illustrates a larger point: that people who challenge their removability in the ordinary course often end

up detained for significant periods of time. *See* Resp. Br. 19-20. The record in this case confirms as much. Roughly 70% of the § 1226(c) subclass filed for relief from the entry of a removal order,[9] and, of those 70%, nearly 40% won relief from a removal order. JA95, tbl. 23. In addition, approximately 4% of Mandatory Subclass members won termination of their removal proceedings because the government failed to meet its burden to establish their threshold removability. JA96 & tbls. 25-26.[10] Ultimately, Mandatory Subclass members were roughly five times more likely to win their removal cases than a typical detainee. *See* JA96 & tbls. 25-26; JA122 & tbl. 35.

Those statistics reveal a strong correlation between the prolonged detention and the presence of substantial arguments against removability. *See also* JA80-81 & tbls. 11-12 (finding that applying for relief extends time in detention). Indeed, the 70% figure quoted above likely understates the number of Mandatory Subclass members with substantial arguments against removability, as it does not account for those who advanced substantial challenges to their threshold removability (either because they were not convicted

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[9] Common forms of relief that defeat removability are asylum, 8 U.S.C. § 1158; cancellation, *id.* § 1229b; adjustment of status, *id.* § 1255; and waiver under § 209(c) of the Immigration and Nationality Act, *id.* § 1159(c). Applications for withholding of removal, *see id.* § 1231(b)(3), and protection under the Convention Against Torture, *see* 8 C.F.R. § 208.18, by contrast, are excluded because those forms of relief do not prevent the entry of a final removal order. *See supra* note 7.

[10] The 4% figure encompasses only the subclass members who successfully challenged their threshold removability; the record does not reveal how many additional subclass members raised substantial (though ultimately unsuccessful) challenges of a similar nature.

of a predicate offense or because they were U.S. citizens). Accordingly, while *amici*'s interpretation does not address the entire problem posed by prolonged detention, it would go a long way toward providing relief to the Mandatory Subclass and avoiding the constitutional question posed by the government's interpretation of § 1226(c).

II. THE CURRENT PROCESS FOR CHALLENGING MANDATORY DETENTIONS FAILS TO ADDRESS THE CONSTITUTIONAL PROBLEM

Under the current system, mandatory detainees receive only a limited opportunity to challenge their detentions: they may request a so-called "*Joseph* hearing" at which they may "raise any nonfrivolous argument available to demonstrate that [they are] not properly included in a mandatory detention category." *Demore*, 538 U.S. at 514 (citing *Joseph*, 22 I. & N. Dec. 799). This Court, though noting the availability of *Joseph* hearings, has not passed on their adequacy. *Id.* at 514 n.3.

Joseph hearings are insufficient to avoid the constitutional problem that respondents and *amici* have identified. Rather than rely on *Joseph* hearings, the Court should hold that detainees are entitled to a bond hearing so long as they present a claim that they are "not deportable" that "(1) [is] not interposed solely for purposes of delay and (2) raises a question of 'law or fact' that is not insubstantial." *Id.* at 578-79 (Breyer, J.). In evaluating whether an immigrant has satisfied that requirement, courts may draw on well-settled criminal "bail standards" "to fill th[e] statutory gap." *Id.* at 578.

A. The *Joseph* Process Is Inadequate

As respondents have explained (at 21 n.6), *Joseph* hearings do not remedy the constitutional problem posed by prolonged mandatory detention. To begin with, *Joseph* severely restricts the type of arguments detainees can make: it allows them only to challenge whether the charged conviction is for a qualifying offense enumerated in § 1226(c). *See Joseph*, 22 I. & N. Dec. at 801. As such, detainees are precluded from challenging their detention based on claims for "relief from removal." JA209. For the reasons set forth above, the Court should construe § 1226(c) to exclude from mandatory detention those immigrants with substantial claims for such relief. *See supra* Part I.A. The inability to make those arguments under the current system renders *Joseph* inadequate.

Further, *Joseph* hearings are inadequate even with respect to the arguments that they allow immigrants to make. *Joseph* places the burden on the detainee to show that the government is "substantially unlikely" to establish that the immigrant committed a criminal offense properly included within a category listed in § 1226(c). 22 I. & N. Dec. at 800. In light of the strong constitutional liberty interests at stake, *see Zadvydas*, 533 U.S. at 692, that standard is far too deferential to the government. Indeed, *Joseph* was issued before *Zadvydas*, and the majority opinion does not even consider detainees' constitutional due-process rights. *See* 22 I. & N. Dec. at 800-09. The only mention of due process appears in the partial dissent, which found that the majority gave unduly short shrift to detainees' "constitutionally-protected liberty interests." *Id.* at 809-10 (Schmidt, J., concurring in part and dissenting in part). In doing so, the majority created a standard so demanding that it

is "not just unconstitutional," but "egregiously so." *Tijani v. Willis*, 430 F.3d 1241, 1246 (9th Cir. 2005) (Tashima, J., concurring).

The practical result of the *Joseph* standard is to make it virtually impossible for erroneously detained immigrants to contest their mandatory detentions.[11] For example, the *Joseph* standard is so stringent that it permits mandatory detention based on an inconclusive record of conviction that would be undisputedly inadequate in a removal proceeding. *Compare In re Grajeda*, 2010 WL 5559182, at *2 (BIA Dec. 15, 2010) (allowing detention based on "inconclusive" "conviction documents"), *with* 8 U.S.C. § 1229a(c)(3) (requiring government to show deportability by "clear and convincing evidence"). It also permits the mandatory detention of U.S. citizens. *Compare In re Ramirez-Garcia*, 2007 WL 1153825, at *2 (BIA Apr. 5, 2007) (permitting detention because evidence of citizenship was "inconclusive"), *with Ramirez-Garcia v. Holder*, 550 F. App'x 501 (9th Cir. 2013) (later granting unopposed petition for review because same detainee was actually a U.S. citizen).

By the same token, *Joseph* places an onerous burden on detainees who raise bona fide *legal* arguments against their inclusion in § 1226(c).[12] That enables absurd results, such as when the BIA sustained a

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[11] *See* Julie Dona, *Making Sense of "Substantially Unlikely": An Empirical Analysis of the Joseph Standard in Mandatory Detention Custody Hearings*, 26 Geo. Immigr. L.J. 65, 87-88 (2011).

[12] *See, e.g., In re Garcia*, 2007 WL 4699861, at *1 (BIA Nov. 5, 2007) ("[a] legal argument that deportability will not be established is insufficient to meet the respondent's burden of proof in this matter in the absence of precedent caselaw directly on point").

mandatory detention based on asserted doubts about whether the Ninth Circuit "would follow its own prior caselaw" making clear that the detainee's conviction was not for a qualifying offense. *In re Mora-Saucedo*, 2010 WL 1607035, at *3 (BIA Mar. 29, 2010); *see Olivas-Motta v. Holder*, 746 F.3d 907, 908 (9th Cir. 2013) (subsequently abrogating the agency decision on which the BIA had relied). It also conflicts with the well-settled principle that "evidentiary standard[s] of proof appl[y] to questions of fact and not to questions of law." *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 114 (2011) (Breyer, J., concurring); *see Moncrieffe v. Holder*, 133 S. Ct. 1678, 1688-89 (2013). When a detainee's challenge rests on a pure question of law, the government is either right or wrong about that question – and mandatory detention should be disallowed if the government is wrong. But, under *Joseph*, an immigrant can escape mandatory detention only if the government's legal position is frivolous. That standard is "all but insurmountable" for detainees and offers them no meaningful protection. *Tijani*, 430 F.3d at 1246 (Tashima, J., concurring).

B. The Court Should Use Criminal Bail Standards To Fill The Statutory Gap

The Court should look to "bail standards drawn from the criminal justice system," instead of the unconstitutional *Joseph* standard, "to fill th[e] statutory gap" created by § 1226(c). *Demore*, 538 U.S. at 578 (Breyer, J.). Rather than place an impossibly onerous burden on detainees, criminal bail standards (applicable to convicted defendants who challenge their convictions on appeal)[13] would permit detainees to

[13] In one sense, immigrants detained under § 1226(c) arguably merit a standard more lenient than do convicted criminal

seek their release when they raise challenges to their removability that are "not insubstantial." *Id.* at 579. Those standards are "more protective of a detained alien's liberty interest than those currently administered in . . . *Joseph* hearings." *Id.* at 578. And they also have "proved workable in practice in the criminal justice system." *Id.* (citing 18 U.S.C. § 3143(b)). Indeed, the circuits already have long experience interpreting the criminal bail statute in a way that is "reasonably easy to apply." *United States v. Powell*, 761 F.2d 1227, 1232 (8th Cir. 1985) (en banc); *see United States v. Schoffner*, 791 F.2d 586, 589 (7th Cir. 1986) (per curiam) (similar). Courts could draw on that experience in applying the test that *amici* propose here.

The interpretive questions posed by the criminal bail statute do not appear to have created any significant problem in the 30 years since the statute was enacted. The circuits' various interpretations of that statute do not "differ significantly from each other," *United States v. Randell*, 761 F.2d 122, 125 (2d Cir. 1985), and *amici* are not aware of a single case in which this Court felt the need to grant certiorari on a question concerning when a defendant's appellate arguments are sufficiently "substantial" to warrant bail under 18 U.S.C. § 3143(b). *See, e.g., Fisher v. United States*, 562 U.S. 831 (2010) (denying certiorari in case concerning interpretation of § 3143(b));

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defendants seeking bail under 18 U.S.C. § 3143(b). After all, defendants applying for bail under the latter statute have by definition already lost at trial and been sentenced to the term of imprisonment from which they are seeking release on bail. But, despite that distinction, *amici* agree that the criminal bail statute would provide a "workable" test for policing mandatory detention in a way that comports "with what the Constitution demands." *Demore*, 538 U.S. at 578-79 (Breyer, J.).

Randell v. United States, 474 U.S. 1008 (1985) (same). Applying the same bail standards to mandatory immigration detention would provide a similarly administrable way of determining when "§ 1226(c) deportability is in doubt" such that mandatory detention is no longer justified. *Demore*, 538 U.S. at 578 (Breyer, J.).

CONCLUSION

The judgment of the court of appeals should be affirmed for the reasons respondents explain. Alternatively, the Court should hold that § 1226(c) permits mandatory detention only when the detainee lacks a substantial challenge to removability.

Respectfully submitted,

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RECORD AND BRIEFS

No. 15-1204

Supreme Court, U.S.
FEB 10 2017
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DAVID JENNINGS, *et al.*,

Petitioners,

v.

ALEJANDRO RODRIGUEZ, *et al.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF OF NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AND THE IMMIGRANT LEGAL RESOURCE CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Northern California Collaborative for Immigrant Justice, Access to Justice for Immigrant Families and Communities: Study of Legal Representation of Detained Immigrants in Northern California (Oct. 2014) 18

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INTEREST OF *AMICI CURIAE*[1]

Amici, two organizations with a long history of defending immigrants' rights, submit this brief to provide an independent basis for affirming the District Court's injunction with respect to immigrants raising a substantial defense to the entry of a removal order. *Amici* fully agree with Respondents' arguments in favor of affirming the District Court's injunction in this case. But, as *amici* explain here, even if the Court declines to affirm the judgment below, the Court should nevertheless grant relief to the thousands of immigrant detainees asserting a substantial defense to removal by affirming the injunction in part.

The National Immigration Project of the National Lawyers Guild ("NLG") is a non-profit membership organization of attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and secure the fair administration of the immigration and nationality laws. For 30 years, the NLG has provided legal training to the bar and the bench on the immigration consequences of criminal conduct. It also is the author of *Immigration Law and Crimes* and three other treatises. The NLG has participated as *amicus curiae* in several

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1. Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* also represent that all parties have consented to the filing of this brief; letters reflecting their blanket consent to the filing of amicus briefs are on file with the Clerk.

significant immigration-related cases before this Court. *See, e.g., Mellouli v. Lynch*, 135 S. Ct. 1980 (2015); *Vartelas v. Holder*, 132 S. Ct. 1479 (2012); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Padilla v. Kentucky*, 559 U.S. 356 (2010). Through its membership network and its litigation, the NLG is knowledgeable about the problems faced by immigrants subject to prolonged detention without bond hearings.

The Immigrant Legal Resource Center ("ILRC") is a non-profit center and national leader in the area of the immigration consequences of criminal convictions. The ILRC has provided information and assistance to thousands of immigration advocates, criminal defenders, courts, and other groups. It has published manuals on the immigration consequences of crimes, and it has regularly filed amicus briefs in this Court in important immigration cases. *See, e.g., Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010). Through its work, the ILRC has developed a strong interest in the issue of prolonged detention.

INTRODUCTION AND SUMMARY

The government claims that Sections 1225(b) and 1226(c)[2] authorize the detention of certain immigrants without any temporal limitation *and* without the provision of a bond hearing before a neutral decision-maker. The District Court rejected this extreme position as raising serious due-process concerns and construed the statute to require bond hearings after six months of detention. The Ninth Circuit affirmed. *Amici* urge the Court to

2. These statutes are codified in Title 8 of the United States Code.

affirm the injunction in full for the reasons Respondents provide in their initial and supplemental briefs. *Amici* write separately to argue that the due-process rights of immigrants raising a substantial defense to removal offer an independent basis for affirming the injunction in part. If the Court declines to affirm the injunction in full, it should nevertheless affirm it in part for the reasons given here.[3]

Outside of the criminal-justice system, our Constitution permits detention only under narrow, carefully limited circumstances. To protect against capricious detention, Anglo-American law has, for centuries, required the Executive to demonstrate at a hearing before a neutral decision-maker that an individual's civil detention is necessary to serve a valid government purpose. This Court has repeatedly enforced these rules against executive-branch efforts to subject individuals to civil detention without due process of law. *E.g.*, *Foucha v. Louisiana*, 504 U.S. 71(1992); *Addington v. Texas*, 441 U.S. 418 (1979).

Here, however, the government claims that Sections 1225(b) and 1226(c) authorize the detention of certain immigrants without any temporal limitation *and* without the provision of a bond hearing before a neutral decision-maker. The government claims that the categorical denial of bond hearings to Class members is justified by its interests in preventing flight and protecting public safety. *Amici* agree with Respondents that detention without a bond hearing becomes prolonged and violates due process

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3. *Amici* interchangeably use the terms "substantial defense to removal" and "substantial defense to a removal order."

after six months. For that reason, *amici* urge the Court to affirm the District Court's injunction requiring the provision of bond hearings to immigrants subject to prolonged immigration detention.

Amici write separately to provide an alternative justification for affirming the injunction in part. As Justice Breyer recognized in *Demore v. Kim*, 538 U.S. 510 (2003), an immigrant with a defense to removal that is "neither insubstantial nor interposed solely for purposes for delay" has "strong" "constitutional claims to bail." *Id.* at 577 (Breyer, J., concurring in part and dissenting in part). In this brief, *amici* identify those defenses and show why the individuals who assert them have a strong constitutional claim to bond.

I.A. Many immigrants have a defense to the government's attempt to remove them from the United States that is "neither insubstantial nor interposed solely for purposes of delay." *Id.* Some immigrants prevail simply because the government is unable to prove its charge of removability. Others obtain a form of relief from removal such as, for example, cancellation of removal or asylum. An immigrant who prevails on a claim for relief retains or acquires lawful permanent resident status (or a pathway thereto). When an immigrant successfully defends against the government's charge of removability or obtains relief from removal, she defeats the government's effort to obtain a removal order. The majority of Class members raise a substantial defense to removal.

Class members who raise a substantial defense to removal are uniquely vulnerable to prolonged detention. Preparing, presenting, and considering a substantial

defense to removal require time and resources. The Nation's overwhelmed Immigration Courts lack both, leaving Class members with a substantial defense to removal to languish in detention while their claims are adjudicated.

I.B. To prevail here, the government must demonstrate that the categorical denial of bond hearings to Class members is reasonably related to the purpose of Class members' detention. The government cites two interests: preventing flight and protecting public safety. But neither justification is availing in light of the "strong" "constitutional claims to bail" possessed by immigrants asserting a substantial defense to removal. *Id.*

Immigrants raising a substantial defense to removal are particularly unlikely to pose a flight risk. These individuals have powerful incentives to submit to the Immigration Court's jurisdiction because they are able to obtain or retain lawful permanent resident status if they prevail. Moreover, electronic monitoring can mitigate the risk of flight without resorting to detention.

Additionally, detaining individuals with a substantial defense to removal is not reasonably related to protecting public safety. Congress has made immigrants with serious criminal convictions ineligible to apply for most forms of immigration relief. An immigrant cannot raise a substantial defense to a removal order if she clearly possesses a disqualifying conviction. Immigrants raising a substantial defense to removal are thus the Class members least likely to endanger the public. The Constitution cannot tolerate the prolonged detention of such individuals without a bond hearing.

I.C. A bond hearing not only ameliorates the due-process concerns raised by prolonged pre-removal detention, but also improves the reliability and fairness of the overall removal proceeding. An immigrant at liberty is better able to secure legal counsel and to assist in preparing her defense. For an immigrant asserting a substantial defense to removal, release from detention may mean the difference between remaining in the United States and being removed to an unfamiliar—and potentially dangerous—country.

I.D. Immigrants may seek a hearing in immigration court to determine if they are properly classified under the mandatory-detention statute. But that hearing does not adequately safeguard the due-process rights of immigrants raising a substantial defense to removal. The *Joseph* standard[4] used in those hearings does not allow the Immigration Judge to consider whether an immigrant has even an obvious claim to relief from removal. And while *Joseph* allows the Immigration Judge to consider the threshold issue of removability, it violates due process by impermissibly placing the burden of persuasion on the immigrant. Most important, a *Joseph* hearing is no substitute for an individualized hearing on flight risk and danger—the touchstone of this Court's due-process jurisprudence.

II. *Demore* did not consider whether an immigrant with a substantial defense to removal has a due-process right to a bond hearing. In *Demore v. Kim*, 538 U.S. 510 (2003), the Court upheld the mandatory detention of a lawful permanent resident who conceded that he

4. *See Matter of Joseph*, 22 I. & N. Dec. 799, 806 (BIA 1999).

was removable but requested withholding of removal. An immigrant who, like Kim, seeks only withholding of removal necessarily accepts the entry of a removal order. Therefore, this Court in *Demore* had no occasion to consider the constitutional implications of detaining an immigrant raising a substantial defense to the entry of a removal order. Accordingly, *Demore* "left open the question of whether mandatory detention under § 1226(c) is consistent with due process when a detainee makes a colorable claim that he is not in fact deportable." *Gonzalez v. O'Connell*, 355 F.3d 1010, 1019–20 (7th Cir. 2004).

III. The Court should affirm the District Court's injunction for the reasons provided by Respondents and to protect the due-process rights of immigrants asserting substantial defenses to removal. If the Court declines to affirm the injunction in full, it should affirm it in part so that immigrants with such defenses receive a bond hearing after no later than six months of immigration detention.

ARGUMENT

I. Immigrant detainees raising a substantial defense to removal have a due-process right to a bond hearing.

To comport with the Constitution, civil detention must bear a reasonable relationship to its purpose. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *see also* Resp. Supp. Br. at 17–18. Here, the prolonged detention, without possibility of bond, of an immigrant who raises a substantial defense to removal does not bear a reasonable relationship to the asserted government interests.

A. Most Class members raise a substantial defense to removal—and are therefore especially likely to suffer prolonged detention triggering due-process concerns.

The overwhelming majority of Class members have raised a substantial defense to removal by challenging the charge of removability or demonstrating statutory eligibility for relief from removal. Ironically, however, the very fact that they have meritorious defenses renders them more vulnerable to prolonged detention because it takes more time to prepare and adjudicate these complex cases. Accordingly, these are precisely the immigrants for whom the risk of a due-process violation is highest.

1. The overwhelming majority of Class members have a substantial defense to removal.

An immigrant may defend against the entry of a removal order in one of two ways.

First, she may seek to defeat the government's initial charge of removability. If the government cannot carry its burden of proving the charge of removability, the Immigration Judge must terminate proceedings. *Woodby v. I.N.S.*, 385 U.S. 276, 286 (1966); 8 C.F.R. § 1240.8(a);

Second, even if she is unable to defeat the government's charge of removability, an immigrant may obtain permanent relief from removal. Examples of such relief include cancellation of removal, adjustment of status to that of a lawful permanent resident, and asylum.[5]

5. *See* 8 U.S.C. § 1229b (criteria for cancellation of removal); *id.* at § 1255 (adjustment of status); *id.* at § 1158 (asylum).

If an immigrant prevails *either* by defeating an initial charge of removability *or* by obtaining permanent relief from removal, proceedings terminate without the entry of a removal order, and any immigrant who obtains relief from removal leaves the courthouse a lawful permanent resident or with an avenue to acquire that status. *In re Mascorro-Perales*, 12 I. & N. Dec. 228, 230 (BIA 1967).

The overwhelming majority of detained Class members raise a substantial defense to removal. While some raise a substantial defense to the government's threshold charge of removability, most seek relief from removal. Seventy percent of Mandatory Subclass members were eligible and applied for cancellation of removal.[6] J.A. 95 tbl. 23; Resp. Supp. Br. at 34 n.10. To be statutorily eligible for this relief, a lawful permanent resident must demonstrate that she has continuously resided in the United States for at least seven years, been a lawful permanent resident for at least five years, and not been convicted of an aggravated felony. 8 U.S.C. § 1229b(a). An immigrant who is able to meet these requirements and who has filed an application for cancellation has raised a substantial defense to removal.

Similarly, over ninety percent of Arriving Subclass members had a "credible" asylum case.[7] 8 U.S.C. § 1225(b)

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6. The District Court certified two Subclasses relevant here: a Mandatory Subclass of immigrants detained under color of Section 1226(c) and an Arriving Subclass of immigrants detained under color of Section 1225(b). *Amici* agree with Respondents that members of the Arriving Subclass members are protected by due-process requirements. Resp. Supp. Br. at 19; *see Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

7. *See, e.g.*, J.A. 98, tbl.28; J.A. 99; J.A. 135, tbl.38.

(1)(B)(v). Government officials interviewed these Subclass members and determined that each had a "significant possibility" of "establish[ing] eligibility for asylum." *Id.* Like the statutorily eligible cancellation applicant, an immigrant whom the government has "screened in" as having a potentially meritorious asylum claim raises a substantial defense to removal. And for reasons discussed below, these individuals have a particularly strong claim to a bond hearing.

2. Immigrants who have substantial defenses to removal are especially likely to suffer prolonged detention in violation of their due-process rights.

Immigrants who raise a substantial defense to removal are more likely than Class members generally to experience prolonged detention unless granted a bond hearing.

A Class member who asserts a substantial defense to removal is more likely to experience prolonged detention because meritorious litigation takes longer to complete than less complex litigation. J.A. at 80–81; *see* Brief of Nine Retired Immigration Judges at 17 (hereinafter "IJ Br."). It takes time for the immigrant to prepare her case and for the government to oppose it. These cases require "careful legal analysis and thorough factual review" from the Nation's Immigration Judges, an overburdened group of officials facing crushing caseloads. IJ Br. at 18.

Immigration Judges carry an average caseload of 1,900 cases. *Id.* at 20. They lack necessary support staff; indeed, there are even fewer chambers clerks than

Immigration Judges. Andrew Taw-Hyun Kim, *Rethinking Review Standards in Asylum*, 55 Wm. & Mary L. Rev. 581, 611 (2013). This lack of resources has contributed a growing backlog of cases, which in turn will lead to Class members having to wait longer for their cases to be adjudicated. *Id.* at 610–11. And this already dismal situation is set to become worse because the government has instituted a hiring freeze that is likely to preclude the hiring of additional Immigration Judges.[8]

B. Categorically subjecting individuals with a substantial defense to removal to prolonged detention without a bond hearing is not reasonably related to the government's asserted interests.

"[D]ue process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson*, 406 U.S. at 738. The government asserts two interests to justify prolonged detention under Sections 1225(b) and 1226(c): preventing the immigrant's flight and preserving public safety. Petr. Supp. Br. at 31. But neither rationale is "reasonabl[y] related" to refusing to grant an individualized bond hearing to immigrants with a substantial defense to removal. *Jackson*, 406 U.S. at 738.

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8. Presidential Memorandum Regarding the Hiring Freeze (Jan. 23, 2017), https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-hiring-freeze.

1. Categorical denial of bond hearings is not reasonably related to preventing flight.

There is no reasonable relationship between preventing flight and denying a bond hearing to an immigrant with a substantial defense to removal who faces prolonged detention. "[A]s a matter of common sense, the likelihood of succeeding on appeal is relevant to flight risk." *United States v. Castiello*, 878 F.2d 554, 555 (1st Cir. 1989). Or, put another way, an immigrant who has much to gain from attending her removal proceeding is far more likely to comply with immigration authorities. Here, an immigrant raising a substantial defense to removal does have much to gain—lawful permanent-resident status or a short pathway to it—as a result of her removal proceedings. *See supra*, p. 9.

The ample rights that Congress has conferred upon lawful permanent residents serve as a powerful set of incentives to attend removal proceedings. Lawful permanent residents have indefinite permission to reside in the United States and they become eligible to apply for citizenship five years after obtaining permanent-resident status.[9] They are entitled to work in the United States on virtually the same terms as citizens, are eligible for federal financial aid for post-secondary education, and may petition for certain family members to immigrate to the United States.[10] Compared to individuals with no chance

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9. 8 U.S.C. § 1427(a). Spouses of U.S. citizens may naturalize even sooner. *Id.* at § 1430(a).

10. 8 U.S.C. § 1324(a)(h)(3) (employment authorization); 34 C.F.R. § 668.33(a)(2)(i) (financial-aid eligibility); 8 U.S.C. § 1153(a)(2) (authorization to petition for immigrant relatives).

of defending against a removal order, immigrants on the threshold of gaining this panoply of rights are far more likely to submit to the jurisdiction of the Immigration Court.

Immigrants asserting two defenses to removal that are very common amongst Class members—asylum and cancellation of removal—are particularly incentivized to attend their removal proceedings. For asylum seekers, the right to remain in the United States may be the difference between life and "death or persecution if forced to return to his or her home country." *I.N.S. v. Cardoza-Fonseca*, 480 US. 421, 449 (1987). An immigrant who fails to appear in Immigration Court may forfeit forever the opportunity to present her asylum claim and avoid removal to an unsafe country. Immigration Judges issue *in absentia* removal orders whenever an immigrant fails to appear. 8 U.S.C. § 1158(d)(5)(A)(v); *id.* at § 1229a(b)(5)(C)(i). Relief from such orders is only narrowly available, *id.*, and the government has promulgated a regulation barring many removed immigrants from later seeking asylum. 8 C.F.R. § 1208.31(e). Thus, an immigrant seeking asylum has strong incentives to appear at her removal proceedings because a failure to do so may waive her ability to present her claim.

Likewise, an immigrant able to assert a substantial claim to cancellation of removal usually poses a much-reduced flight risk because she has "extensive ties in the community" and "close relationship[s]" to U.S. citizens and lawful permanent residents. *Troung Dinh Hung v. United States*, 439 U.S. 1326, 1329 (1978) (Brennan, J., in

chambers). To be eligible to apply for this form of relief,[11] lawful permanent residents must demonstrate seven years of continuous residence in the United States, including five as a lawful permanent resident. 8 U.S.C. § 1229b(a)(2). As Justice Brennan noted in *Troung Dinh Hung*, individuals with such strong ties to the United States are particularly unlikely to abscond. 439 U.S. at 1329 (Brennan, J., in chambers). And, like the asylum applicant who absconds, the cancellation applicant who fails to appear forfeits her opportunity to obtain relief that would enable her to retain the "family, social, and economic ties" that lawful permanent residents develop to the United States and its citizens. *Woodby v. I.N.S.*, 385 U.S. 276, 286 (1966).

The availability of alternatives to detention also shows why the government's categorical denial of bond hearings is unreasonable. Immigration authorities operate the Intensive Supervision and Appearance Program (ISAP), which releases individuals into the community under electronic supervision. The government's most knowledgeable witness testified that in one Southern California service area virtually 100% of ISAP participants appeared at their removal hearings, and he estimated that compliance in the Los Angeles service area reached 90%. J.A. 564–65. This alternative further demonstrates that detention is not necessary to prevent the flight of an immigrant with a substantial defense to removal.

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11. Cancellation of removal was the most common type of relief that Class members sought. J.A. at 78.

2. Categorical denial of bond hearings is not reasonably related to protecting public safety.

Similarly, there is no reasonable relationship between protecting public safety and denying a bond hearing to an immigrant with a substantial defense to removal who faces prolonged detention. A Class member with a conviction serious enough to make her ineligible for relief from removal would not have a substantial defense from removal. By contrast, Congress specifically *preserved* the possibility of relief for immigrants whose criminal convictions render them removable but are not so serious as to render them categorically unfit to obtain relief from removal. Individuals falling into this latter category may be able to raise a substantial defense to removal; and it is illogical to assume that they categorically threaten public safety, given Congress's intent to give each of them the opportunity to apply for relief from removal.

Congress already has eliminated removal defenses for most people who could pose a threat to public safety. For instance, asylum is unavailable to any individual who has been convicted of a "particularly serious crime,"[12] a serious non-political crime,[13] or an aggravated felony.[14] Likewise, asylum is unavailable to any individual who has persecuted

12. 8 U.S.C. at § 1158(b)(2)(A)(ii).

13. *Id.* at § 1158(b)(1)(A)(iii).

14. *Id.* at § 1158(b)(2)(B)(i).

others[15] or been found to be involved in terrorist activity[16] or to pose a danger to the security of the United States.[17] As this wide range of descriptions suggests, an individual who poses a danger to the community is likely to be barred from raising a claim to asylum.

Congress also has precluded many individuals with serious criminal offenses from obtaining cancellation of removal. A lawful permanent resident cannot obtain cancellation unless she can prove that she has never been convicted of an aggravated felony.[18] And an immigrant who is not a lawful permanent resident may obtain cancellation of removal only if she can show that she possesses good moral character *and* can establish that she has not been convicted of a crime involving moral turpitude, an offense related a controlled substance or firearms, or an aggravated felony.[19] Because of these bars, an individual who poses a danger to the community could not raise a substantial defense to removal.

These prohibitions demonstrate the unreasonable nature of the government's categorical denial of a bond hearing to Class members, at least insofar as that denial affects immigrants with a substantial defense to removal. Immigrants with lesser convictions are the only Class members able to raise a substantial defense to removal.

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15. *Id.* at § 1158(b)(2)(A)(i).

16. *Id.* at § 1158(b)(1)(A)(v).

17. *Id.* at § 1158(b)(1)(A)(iv).

18. *Id.* at § 1229b(a)(3).

19. *Id.* at § 1229b(b)(1)(B)&(C).

The government's public-safety justification rings hollow given the specific eligibility criteria governing relief from removal.

C. A bond hearing not only ameliorates the due-process concerns raised by prolonged pre-removal detention, but also improves the reliability and fairness of the overall removal proceeding.

An immigrant with a substantial defense to removal may win release after a proper bond hearing.[20] And once released, that immigrant is far more likely to participate effectively in her removal proceedings.

The reason is simple. An immigrant at liberty is better able to prepare and present her defense to the Immigration Court. In the criminal-justice system, the "traditional right to freedom before conviction permits the unhampered preparation of a defense." *Stack v. Boyle*, 342 U.S. 1, 4 (1951). For at least two reasons, this reasoning applies equally to immigration proceedings, which may culminate in the "particularly severe 'penalty'" of removal. *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)).

First, detained immigrants are far less likely than non-detained immigrants to secure legal representation. While the Constitution requires the government to provide criminal defendants with legal representation, *Gideon*

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20. *Amici* address why a hearing conducted under *In re Joseph*, 22 I. & N. Dec. 799, 806 (BIA 1999), is not a bond hearing *infra* at pp. 20-22.

v. Wainwright, 372 U.S. 335 (1963), this Court has not yet recognized a constitutional entitlement to counsel in immigration proceedings. Thus, liberty prior to removal becomes a far more important factor in determining whether an immigrant is likely to retain a lawyer. Non-detained immigrants are almost *five times* more likely than detained immigrants to have legal representation.[21] And this difference matters, because the outcome of the proceeding often turns on whether an immigrant has a lawyer. A recent study of New York-area immigration courts shows that detained immigrants with counsel are *six times* more likely than unrepresented detainees to obtain some form of relief from removal.[22] A study of San Francisco immigration courts reached a similar conclusion.[23] Accordingly, an immigrant's ability to obtain counsel—which may hinge entirely upon whether the individual is at liberty—often determines whether the immigrant will earn the right to remain in the United States or face "the equivalent of banishment or exile." *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947).

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21. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 31 (2015).

22. N.Y. Immigrant Representation Study Report, Accessing Justice; The Availability and Adequacy of Counsel in Immigration Proceedings at 3 (Dec. 2011), http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf.

23. Represented detainees in San Francisco were more than three times more likely to prevail in their removal cases compared to unrepresented detainees. Northern California Collaborative for Immigrant Justice, Access to Justice for Immigrant Families and Communities: Study of Legal Representation of Detained Immigrants in Northern California at 9 (Oct. 2014), http://www.lccr.com/wp-content/uploads/NCCIJ-Access-to-Justice-Report-Oct.-2014.pdf.

Second, the unique nature of removal proceedings disadvantages immigrants who proceed without counsel. Asylum seekers, for example, may need to obtain psychological evaluations, witness statements, and information about conditions in their home country. *See* 8 U.S.C. § 1158(b)(1)(B)(ii). To accomplish these tasks, asylum seekers may need to communicate with people in the home country, an especially difficult job from a detention facility. Likewise, an applicant for cancellation of removal may need to secure hard-to-obtain documentation to prove her continuous presence in the United States or to establish that she has not been convicted of an aggravated felony. 8 U.S.C. § 1229b(b)(1)(D). *See* IJ Br. at 13 (noting that "[p]rolonged detention hobbles . . . detainees' attempts to clearly present issues to the immigration court"). Thus, a detained immigrant preparing this type of fact-intensive defense without the aid of counsel is doubly disadvantaged by detention because she can neither retain a lawyer nor gather the evidence necessary to prove her defense.[24]

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24. For these same reasons, the Court should reject the government's argument that Class members with criminal convictions who seek discretionary relief from removal somehow have a diminished liberty interest. Petr. Supp. Br. at 35. The government claims that an immigrant's removability is often established "beyond dispute" by a judgment of conviction. Not so. The legal analysis governing this determination is difficult even for the Courts of Appeal to administer. *See, e.g.*, *Descamps v. United States*, 133 S. Ct. 2276, 2287 (2013). Immigration Judges and the Board of Immigration Appeals also struggle with this area of law, and the Courts of Appeals regularly reverse removal orders in cases involving detained immigrants. *See e.g.*, *Castillo v. Holder*, 776 F.3d 262 (4th Cir. 2015) (vacating removal order of detained lawful permanent resident); *Medina-Lara v. Holder*, 771 F.3d 1106 (9th Cir. 2014) (same). As Justice Breyer noted in *Demore*, this area of law can give rise easily to a defense from removal

Accordingly, a bond hearing not only ameliorates the due-process concerns raised by prolonged pre-removal detention, but also improves the reliability and fairness of the overall removal proceeding.

D. The availability of a *Joseph* hearing does not save Section 1226(c) from constitutional challenge.

The government's attempt to present *Joseph* hearings as a safeguard against arbitrary detention is unpersuasive because those hearings utterly fail to protect the due-process rights of immigrants asserting a substantial defense to a removal order. *See* Petr. Supp. Br. at 7, 11–12.

Immigration Judges conduct *Joseph* hearings to determine whether individuals who have been subjected to mandatory detention under Section 1226(c) are in fact properly subject to the statute. 8 C.F.R. § 1003.19(h)(2)(ii). But the standard imposed by *Joseph* hearings is virtually impossible to meet: An individual must demonstrate that the government is "substantially unlikely to establish" the charges that allegedly render the individual subject to mandatory detention. *In re Joseph*, 22 I. & N. Dec. 799, 806

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that is "neither insubstantial nor interposed solely for purposes of delay." *Demore*, 538 U.S. at 577 (Breyer, J., concurring in part and dissenting in part).

Moreover, the discretionary nature of relief from removal is irrelevant to whether an immigrant should be afforded the right to seek counsel. Petr. Supp. Br. at 36. Congress has specifically provided immigrants the right to secure legal representation for all phases of a removal proceeding. 8 U.S.C. § 1229a(b)(4)(A). Freedom from prolonged detention aids the immigrant in availing herself of that right.

(BIA 1999). As a practical matter, this means that unless the government's charges are frivolous, an immigrant subjected to mandatory detention cannot prevail—no matter how strong a claim she may have that she will ultimately not be ordered removed.

The *Joseph* standard is deeply flawed on two levels. Substantively, *Joseph* asks the wrong question because it focuses narrowly only on whether an immigrant is *removable* as a threshold matter, rather than whether an immigrant is likely to *avoid a removal order,* which she may do either by successfully challenging the charge or by establishing eligibility for one of the forms of permanent relief from removal. *See* J.A. 322 (testimony of Assistant Chief Immigration Judge). A broader inquiry that takes into account all of a detainee's potential defenses to removal would "strike[] the best balance between an alien's liberty interest and the government's interest in regulating immigration." *Tijani v. Willis*, 430 F.3d 1241, 1247 (9th Cir. 2005) (Tashima, J., concurring).

Second, the *Joseph* standard is flawed because, rather than requiring the government to justify continued detention, it forces the *immigrant* to justify release, and does so by imposing a standard that, as noted above, is virtually impossible to meet.[25] Thus, the standard violates "the principle that the risk of erroneous deprivation of a fundamental right may not be placed on the individual." *Tijani*, 430 F.3d at 1245 (Tashima, J., concurring); *accord Addington v. Texas*, 441 U.S. 418, 423 (1979).

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25. *See* Julie Dona, *Making Sense of "Substantially Unlikely": An Empirical Analysis of the* Joseph *Standard in Mandatory Detention Custody Hearings*, 26 Geo. Immigr. L. J. 65, 78 (2011).

But the *Joseph* standard's fundamental flaw is that it does not permit the Immigration Judge to conduct an individualized hearing on flight risk and danger to the community. This inquiry is the touchstone of this Court's civil-detention cases. *Salerno v. United States*, 481 U.S. 739, 748–50 (1987). *Joseph*'s failure to even consider these matters demonstrates its inability to safeguard the constitutional rights of any Class member.

II. *Demore* did not consider whether an immigrant with a substantial defense to removal has a due-process right to a bond hearing.

Demore did not address the due-process rights of an immigrant asserting a substantial defense to a removal order. As explained below, immigration law distinguishes between *relief* from removal and *protection* from removal.[26] An immigrant who receives relief from removal has the right to remain in the United States. An immigrant who receives protection from removal obtains only a provisional stay of the execution of a

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26. The government declines to acknowledge this distinction in its brief. Petr. Supp. Br. at 8 n.1. But the government trains Immigration Judges on this very point of law. Charles A. Wiegand III, Fundamentals of Immigration Law 113 (rev. Feb. 2016) (excluding withholding of removal from "form of relief"), https://www.justice.gov/sites/default/files/pages/attachments/2016/03/03/fundamentals_of_immigration_law_-_feb_2016.pdf, https://www.justice.gov/eoir/immigration-judge-benchbook. And the government fiercely enforces the distinction between relief and protection from removal in its enforcement of the law. *Matter of I-S- & C-S-*, 24 I. & N. Dec. 432, 433–34 (BIA 2008) (holding that entry of a removal order is a necessary predicate to obtaining withholding of removal).

removal order. Kim, the immigrant in Demore, applied only for a form of protection from removal. As a result, this Court had no occasion to consider the due-process rights of an immigrant who attempts to rebut the charge of removability or who applies for permanent relief from removal.

Kim, the immigrant in *Demore*, initially applied for withholding of removal. Withholding of removal is a form of protection, not relief, from removal. An immigrant who obtains withholding accepts a final order of removal and is unable to obtain lawful permanent residence. 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 1208.16; *Matter of I-S- & C-S-*, 24 I. & N. Dec. 432, 433–34 (BIA 2008). Indeed, an immigrant who has obtained withholding of removal may still be removed to a different, safe country. 8 C.F.R. § 1208.22. And the government may seek permission to execute the removal order if conditions change in the immigrant's home country. 8 C.F.R. § 1208.24. Thus, withholding of removal is not a complete defense to a removal proceeding.

The Court decided *Demore* assuming that Kim had conceded his removability, had foregone the opportunity to apply for permanent relief from removal, and had sought only withholding of removal. *Demore*, 538 U.S. at 522 n.6. *Demore* thus "left open the question of whether mandatory detention under § 1226(c) is consistent with due process when a detainee makes a colorable claim that he is not in fact deportable." *Gonzalez v. O'Connell*, 355 F.3d 1010, 1019–20 (7th Cir. 2004).

III. The due-process rights of immigrants who raise a substantial defense to removal justify affirming the District Court's injunction.

Amici agree with Respondents that the Court should affirm the District Court's injunction because Class members have a due-process right to a bond hearing in the face of prolonged detention. Moreover, the due-process rights of immigrants with a substantial defense to removal also support affirming the injunction in full. The Court may affirm the judgment below on "any ground that the law and the record permit and that will not expand the relief granted below." *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984); *accord Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982). Because the vast majority of Class members raise a substantial defense to removal, affirmance of the injunction in full is appropriate.

However, if the Court declines to affirm the injunction in full, *amici* urge the Court to affirm it in part so as to provide bond hearings after no more than six months of detention to Class members who raise a substantial defense to removal.

CONCLUSION

For the foregoing reasons and those offered by Respondents and other *amici*, *amici* respectfully urge the Court to affirm the injunction.

Respectfully submitted,

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RECORD AND BRIEFS

No. 15-1204

OFFICE OF THE CLERK

In The

Supreme Court of the United States

DAVID JENNINGS ET AL., PETITIONERS

v.

ALEJANDRO RODRIGUEZ ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE NINE RETIRED IMMIGRATION JUDGES AND BOARD OF IMMIGRATION APPEALS MEMBERS IN SUPPORT OF RESPONDENTS

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BRIEF FOR NINE RETIRED IMMIGRATION JUDGES AND BOARD OF IMMIGRATION APPEALS MEMBERS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

This brief is submitted on behalf of the following retired immigration judges and Board of Immigration Appeals ("BIA") members: Hon. Sarah Burr, Hon. Joan V. Churchill, Hon. Bruce J. Einhorn, Hon. John F. Gossart, Jr., Hon. Eliza Klein, Hon. Nancy R. McCormack, Hon. Paul Nejelski, Hon. Lory D. Rosenberg, and Hon. Bruce W. Solow.[1]

INTEREST OF AMICI CURIAE

Amici curiae are former immigration judges and members of the BIA. Amici have an interest in this case based on their years of dedicated service administering the immigration laws of the United States. Amici believe that the Ninth Circuit's decision—requiring individualized bond hearings for immigrants subject to prolonged pre-final-order detention—is a correct interpretation of 8 U.S.C. §§ 1225(b) and 1226(a), (c). The decision acknowledges the legitimate purposes pre-final-order detention serves, including preventing flight and protecting communities. It furthers those purposes while mitigating the high costs, both human and financial, of unnecessarily and

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[1] All parties consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief.

unreasonably detaining immigrants in the small percentage of cases where detention exceeds six months. In addition, the decision advances the overall administration of the immigration laws. Based on their experiences handling tens of thousands of cases, amici believe holding individualized bond hearings for immigrants subject to prolonged pre-final-order detention furthers the just and efficient enforcement of the immigration laws. Amici encourage the Court to affirm.

STATEMENT

Removal proceedings in immigration court can be complex, time-intensive affairs for the immigration judges who oversee them, a situation exacerbated when the immigrant is detained for prolonged periods during the process without access to a bond hearing. Moreover, it is those cases where an immigrant may have a meritorious defense to removal that are most likely to demand the most amount of time.

Removal proceedings begin in immigration court when the government files a charging document and serves it on an immigrant. 8 U.S.C. § 1229; 8 C.F.R. §§ 239.1, 1003.14. The notice specifies the basis for the proceedings and informs the immigrant when and where the proceedings will be held. 8 U.S.C. § 1229(a). An immigration judge presides over the proceedings. *Id.* § 1229a(a).

Removal proceedings can involve many of the procedures of a typical trial, including live witness testimony, a wide range of evidence, and legal and factual

arguments. 8 C.F.R. §§ 1240.7, 1240.10; *see generally* 8 C.F.R. part 1240. Yet immigrants often have no experience with such procedures. Immigrants therefore may be represented at any proceeding by counsel. § 1229a. But they generally must fund the representation themselves or find pro bono counsel; unlike in criminal proceedings, there is no universal right to appointed counsel at government expense. *Ibid.*; 8 C.F.R. § 1292.1. Perhaps as a result, the vast majority of detained immigrants—86% nationally—lack counsel in immigration proceedings. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 32, fig. 6 (2015) (studying immigration cases from 2007 through 2012). For this class of immigrants, therefore, it will fall to the immigration judge to guide the immigrant through the sometimes complex and almost always unfamiliar process. In part for that reason, immigration judges routinely grant, and even encourage, requests by immigrants for continuances to allow time to find a lawyer. *See id.* at 61, fig. 16 (tracking the percentage of total case duration attributable to time spent searching for counsel, which can exceed 50% when an immigrant is detained); *see also* § 1229a(b)(4)(A) (guaranteeing an immigrant's right to seek counsel at no expense to the government).

Although many removal proceedings for detained immigrants are resolved quickly, immigrants who challenge their removal routinely are detained for prolonged periods while their cases are adjudicated. When contested, a proceeding before an immigration

judge must resolve two issues: (1) whether an immigrant is deportable or inadmissible as charged; and, if so, (2) whether the immigrant qualifies for any ground of relief from removal. Non-citizens may be eligible for various waivers or relief from removal, including cancellation of removal under 8 U.S.C. § 1229b, adjustment of status under 8 U.S.C. § 1154, asylum under 8 U.S.C. § 1158, withholding of removal under 8 U.S.C. § 1231(b)(3), or a claim for protection under the Convention Against Torture, 8 C.F.R. §§ 208.16, 208.17. An immigration judge will not enter a final disposition without first resolving disputes over both the charge of deportability/inadmissibility and any available relief.

An immigration judge generally first sees an immigrant at a preliminary proceeding known as master calendar. *See, e.g.*, *In re Arguelles-Campos*, 22 I&N Dec. 811, 813-15 (BIA 1999). A typical morning or afternoon master calendar session may bring dozens of immigrants before a single immigration judge. The immigration judge will ask each immigrant to enter a plea to the charges against her and ask whether she will be seeking any form of relief. The judge will ensure that the immigrant has all of the necessary application forms for requesting relief, particularly for immigrants who do not have representation and may face language and other challenges. Through questioning of both the immigrant and attorney for the government, the judge will seek to estimate the time needed to resolve any disputed issues of deportability/inadmissibility and relief. Based on the responses, the parties' availability, and the many demands on the court's

own calendar, the judge will then schedule a hearing for a future date, reserving a block of time covering anywhere from a few hours to several days depending on the complexity of the issues. Additional hearings are always required if an immigrant disputes the charges or seeks relief.

An immigration judge may need to resolve many issues during the course of removal proceedings. As an initial matter, a judge needs to determine whether an immigrant is a United States citizen. Determining citizenship can be complex. Additionally, even in cases where there is no dispute over the underlying facts supporting removal, removability may nevertheless turn on complex legal issues, such as whether a conviction qualifies as an aggravated felony or a crime of moral turpitude. *See, e.g.*, *Lynch v. Dimaya*, No. 15-1498 (granting certiorari to consider whether the statutory provisions governing removal for a conviction of an aggravated felony are unconstitutionally vague). Resolving such issues can significantly lengthen the time to resolve the dispute, particularly when cases proceed through both administrative and federal court appeals. *See ibid.*

Moreover, disputes surrounding relief under the various provisions can involve their own complex legal issues and also may require fact-intensive review. Eligibility for relief may turn on thorny questions of statutory interpretation implicating both state and federal law. *See, e.g.*, *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013); *INS v. St. Cyr*, 533 U.S. 289, 292-93 (2001). Factual disputes can involve determining whether an

immigrant has proved a period of continuous residency, lack of certain criminal convictions, and "good moral character." § 1229b(a), (b). Similarly, refugees seeking asylum may be required to present evidence of past persecution or expert opinion about political or social conditions in their countries of origin supporting a well-founded fear of persecution. *Id.* §§ 1101(a)(42), 1158(b). To allow an immigrant the necessary time to gather and prepare this information, an immigration judge routinely will grant one or more continuances.

If an immigration judge determines that an order of removal is proper, an immigrant has thirty days to appeal to the BIA. 8 C.F.R. § 1240.53. Once again, immigrants who choose to press potentially meritorious defenses on appeal are likely to increase the amount of time needed to decide removal—an appeal to the BIA can take six months or longer from start to finish. Executive Office for Immigration Review, *Certain Criminal Charge Completion Statistics* 4 (Aug. 2016) (hereinafter "EOIR Data").[2] If an immigrant chooses not to appeal or the appeal is dismissed, the immigration judge will issue a final order of removal. 8 C.F.R. § 1241.1. A party may seek judicial review of a BIA decision by petition to the appropriate court of appeals. 8 U.S.C. § 1252(a)(5). Federal review can take years to complete. *E.g.*, *Moncrieffe*, 133 S. Ct. at 1683-84.

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[2] *Available at* https://www.justice.gov/sites/default/files/pages/attachments/2016/08/25/criminal-charge-completion-statistics-201608.pdf.

Immigration judges work hard to manage these complex proceedings, often with limited resources. As of January 2016 there were 474,025 cases pending in United States immigration courts. Human Rights First, *The U.S. Immigration Court: A Ballooning Backlog that Requires Action* 2 (Mar. 15, 2016).[3] That is more than double the caseload from a decade ago. *Ibid.* Yet the number of immigration judges on the bench has only marginally increased in that same period, from 210 at the end of fiscal year 2007 to 256 at the end of fiscal year 2015. *Ibid.* As explained below, detaining immigrants for prolonged periods without bond proceedings only adds to the immigration judge's difficult task of fairly and efficiently deciding removal cases.

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[3] *Available at* www.humanrightsfirst.org/sites/default/files/HRF-Court-Backlog-Brief.pdf.

SUMMARY OF THE ARGUMENT

I.A. Prolonged pre-final-order detention imposes significant costs on the immigration system. The class of immigrants in this case naturally focuses on the constitutional concerns raised by prolonged detention without a bond hearing. But pre-final-order detention also has significant practical effects on the administration of the immigration laws. Detention prevents many immigrants who are challenging removal from effectively presenting their cases because it reduces detainees' access to counsel and impairs their ability to gather relevant evidence in support of their cases. That, in turn, makes it more difficult for immigration judges accurately and fairly to render decisions. When removal is disputed, the outcome can turn on complex factual and legal issues, resolution of which demands a full record and clearly presented arguments. Those challenges do not end in immigration court but carry through to any appeal, because the BIA must evaluate trial determinations based on the underlying record.

B. Prolonged pre-final-order detention harms our immigration system precisely where it needs to be at its best—when an immigrant presents a potentially meritorious defense to removal. Although the vast majority of cases are resolved quickly, cases presenting potentially meritorious defenses are more likely to take time. But more time leads to prolonged detention when bail hearings are unavailable. And because detainees in prolonged detention are less able to obtain counsel and present their cases, prolonged detention without bail hearings deprives immigration judges of

help in those cases most likely to involve complex legal or factual issues.

C. Detaining immigrants for long periods of time increases costs on an already overburdened immigration system, consuming resources that might better be spent elsewhere. Yet alternatives such as supervised release using electronic monitoring cost a fraction of the price of housing detained immigrants for prolonged periods. Requiring bond hearings when pre-final-order detention exceeds six months will free up resources that can be used to resolve other challenges facing our immigration system.

II. The small subset of cases involving prolonged pre-final-order detention is well suited to bond hearings. Immigration judges are already familiar with administering bond hearings. They regularly conduct such hearings for immigrants charged with removal under other statutory provisions, including for people with criminal convictions and refugees who have recently crossed the border.

When a judge conducts a bond hearing for an immigrant who already has been detained for a lengthy period, the judge has even more information on which to base her judgment. She will be familiar with the immigrant's case and will have had an opportunity to assess the immigrant's credibility. And she can benefit from additional information gathered by the government during the detention.

Moreover, there is no reason to believe that requiring bond hearings would impose significant additional

administrative burdens on immigration judges. Such hearings would be required in only a small minority of cases. And the hearings can easily be streamlined at a judge's discretion.

ARGUMENT

I. PROLONGED PRE-FINAL-ORDER DETENTION IMPOSES SIGNIFICANT COSTS ON THE IMMIGRATION SYSTEM

Prolonged pre-final-order detention undermines the efficacy of removal proceedings in at least three ways. First, it increases the strain on immigration judges when immigrants are unable to obtain counsel or effectively present their cases due to prolonged detention. Second, it makes cases with potentially meritorious defenses to removal the hardest to administer. Third, it consumes vast resources housing immigrants, resources that could be spent hiring more judges and staff and improving courtrooms and technology for a beleaguered immigration system.

A. Prolonged Pre-Final-Order Detention Adds To Immigration Judges' Heavy Workload By Preventing Immigrants From Obtaining Counsel And Effectively Presenting Their Cases

Removal proceedings in which immigrants cannot effectively present their cases place significant burdens on the immigration judges conducting these proceedings and on the BIA members reviewing their decisions. Three factors contribute to the difficulties

immigration judges face when deciding the cases of immigrants who are detained for long time periods.

First, pre-final-order detention reduces immigrants' access to counsel. This Court long has recognized "that the complexity of immigration procedures, and the enormity of the interests at stake, make legal representation in deportation proceedings especially important." *Ardestani v. INS*, 502 U.S. 129, 138 (1991). Yet studies consistently show that detained immigrants have lower rates of legal representation than immigrants who are released pending removal proceedings. *See Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings: New York Immigrant Representation Study Report: Part 1*, 33 Cardozo L. Rev. 357, 367-73 (2011) (finding that "custody status (i.e., whether or not [individuals] are detained) strongly correlates with their likelihood of obtaining counsel"). For example, one nationwide study showed that only about one in seven detained immigrants is successful in obtaining representation; immigrants that are never detained are nearly five times more likely to have representation. Eagly, *supra*, at 31-32 (reporting that 14% of detained immigrants obtained representation, compared to 66% of those never detained); *see also* Lori A. Nessel & Farrin R. Anello, *Deportation Without Representation: The Access-to-Justice Crisis Facing New Jersey's Immigrant Families*, Seton Hall Ctr. For Social Justice (June 2016)

(reporting similar numbers from a case study in New Jersey).[4]

There are many reasons that detained immigrants are less able to obtain legal assistance. Detainees are less likely to have the resources to retain counsel because they are unable to work while detained. *See* Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 Hastings L.J. 363, 368 (2014). Detainees also are less likely to obtain pro bono representation because most detention facilities are far from urban centers with public interest organizations, large private law firms, and law school clinical programs offering pro bono services. *Ibid.*

Second, even for the small minority of detained immigrants fortunate enough to obtain representation, pre-final-order detention still negatively affects that representation and thus increases the workload on immigration judges. Detention makes attorney-client communications more difficult. All in-person attorney-client meetings must occur at detention facilities. The significant distance between detention facilities and the urban centers where most immigration lawyers practice makes such meetings difficult. Dora Schriro, U.S. Immigration & Customs Enforcement, *Immigration Detention Overview and Recommendations* 23-24 (Oct. 2009).[5] And attorneys may be unable

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[4] *Available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id= 2805525.

[5] *Available at* https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf.

to make lengthy telephone calls to detention centers without interruption by officials at the facility. *See* Inter-Am. Comm'n on Human Rights, *Report on Immigration in the United States: Detention and Due Process* 130-132 (Dec. 2010). When immigrants and their counsel are unable to communicate effectively, their cases may require more continuances or may be presented less clearly. And that spells more work for immigration judges.

Third, understanding the factual and legal basis for a pro se detainee's case presents an even greater challenge for the diligent immigration judge. Prolonged detention hobbles such detainees' attempts to clearly present issues to the immigration court. Detention facilities often have inadequate or outdated legal resources. *See id.* at 117; U.S. Comm'n on Int'l Religious Freedom, *Report on Asylum Seekers in Expedited Removal* 186 (Feb. 2005) (finding that "in *none* of the facilities visited by the experts were all the legal materials listed in the DHS detention standards * * * present and up-to-date" (emphasis added)). Restricted communication with the outside world only exacerbates that problem. Inter-Am. Comm'n, *supra*, at 117. Detained immigrants without representation are also less able to gather evidence and otherwise develop the required factual support for their defenses.

Studies confirm the common-sense notion that cases involving represented immigrants are better argued and processed more efficiently both in the immigration courts and at the BIA. For example, while BIA

members consistently report that quality briefing facilitates effective legal review of removal proceedings, most unrepresented immigrants do not submit any brief at all in BIA proceedings. *See* Board of Immigration Appeals, *The BIA Pro Bono Project Is Successful* 10 (Oct. 2004).[6]

Conscientious immigration judges attempt to overcome the difficulties caused by prolonged pre-final-order detention by taking time to ensure that unrepresented detainees understand their rights. Judges also must work to develop a proper record for the BIA's review. As one immigration judge has written, conducting removal proceedings for pro se detainees "puts substantial pressure on the judge to ensure that available relief is thoroughly explored and the record fully developed." Noel Brennan, *A View from the Immigration Bench*, 78 Fordham L. Rev. 623, 626 (2009) ("However time-consuming, it is our duty to explain the law to pro se immigrants and to develop the record to ensure that any waiver of appeal or of a claim is knowing and intelligent."). To that end, immigration judges regularly grant continuances in cases to allow immigrants more time to gather necessary evidence and to ensure properly developed records. But the extra effort required of judges to manage cases involving pro se immigrants places additional strain on the already overburdened immigration courts.

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[6] *Available at* http://www.justice.gov/eoir/reports/BIAProBonoProjectEvaluation.pdf.

The extra effort for cases involving pro se immigrants is a result of more than simply the goodwill of immigration judges—conducting a fair hearing requires it. Fairness requires immigration judges to ensure that immigrants understand the procedures that will be used and the available avenues for relief. Indeed, regulations explicitly require the latter. 8 C.F.R. § 1240.11(a)(2) (judge must inform immigrant of "her apparent eligibility to apply" for relief). Fulfilling these requirements is harder when immigrants lack guidance from experienced counsel.

Despite immigration judges' best efforts, studies show significant disparities in outcomes based on representation and detention-status. *See Developments in the Law: Immigration Rights and Immigration Enforcement, Representation in Removal Proceedings*, 126 Harv. L. Rev. 1658 (2013). These disparities make clear that detention alone can, in some cases, determine the substantive outcome of removal proceedings—whether an immigrant ultimately is deported or allowed to remain in the United States.[7] And data bear that out: recent analysis shows immigrants released on bond were ultimately permitted to remain in the United States at a higher rate than the general population of immigrants in removal proceedings. Transactional Records Access Clearinghouse, *What Happens When*

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[7] *Cf.* Brennan, *supra*, at 624 (noting that, even in represented cases, if "the attorney fails to create a complete record including submitting documents that are essential to the case, the immigrant may lose, no matter how authentic his claim for asylum may be or how dire the consequences of deportation").

Individuals Are Released On Bond In Immigration Court Proceedings? (Sept. 14, 2016) (hereinafter "TRAC Report").[8] For 2015, immigrants who were allowed to post bond and released from detention facilities overwhelmingly were permitted to remain in the United States, at a rate of two out of three. Only slightly more than half of immigrants, whether released on bond or detained, ultimately prevailed in overcoming a charge of removability. *Ibid.*[9]

B. Prolonged Pre-Final-Order Detention Makes Cases With Potentially Meritorious Defenses To Removal Among The Hardest To Administer

Immigration judges most benefit from well-presented cases in those cases raising challenging legal or factual issues. Yet these are the cases most likely to be poorly presented when immigrants are detained for prolonged periods without a bond hearing.

The vast majority of removal proceedings are resolved without prolonged pre-final-order detention. For example, recent data on immigrants detained under Section 1226(c) for specific charges show that immigrants spent on average less than eighty days in detention when there was no appeal to BIA. EOIR Data 2. Half of such immigrants spent twenty-nine days or less. *Ibid.* These removal proceedings may be

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[8] *Available at* http://trac.syr.edu/immigration/reports/438/.

[9] Fifty-four percent of immigration court cases completed in 2015 resulted in the charged immigrant being allowed to remain in the U.S. *Ibid.*

completed within a few weeks because in many cases removal is not challenged.

As a result, prolonged detention—defined in this case as detention for more than six months—will most frequently occur in the minority of cases where a respondent detainee presents some potentially meritorious defense against removal. For example, immigrants detained under Section 1226(c) for specific charges who appealed their case to the BIA spent an average of 313 days in pre-final-order detention based on recent data. *Id.* at 4. When no appeal was filed immigrants spent on average only seventy-eight days in detention. *Id.* at 2.

Those with potentially meritorious defenses to removal are also likely to present the best cases for release if afforded a bond hearing. Many forms of relief are available to only people with longstanding ties to the United States and minor criminal histories. *E.g.*, 8 U.S.C. § 1229b(a), (b). Immigrants with colorable claims to such relief are thus likely to have stronger community ties, which discourages flight. And they are likely to have less serious criminal convictions and, therefore, are less likely to pose a danger to the community.

Data from the class of immigrants in this case confirm this. The class's expert report shows class members prevailed in their cases five times more often than similarly situated non-class members. J.A. 122 (Table

35).[10] Yet those victories often came with significant detention time, which carries all the consequences discussed above, *supra* Section I.A. Class members who applied for some form of relief (rather than contesting only the underlying charges of removability) suffered on average a significantly increased detention time. For cases that proceeded all the way through appeal, applying for relief extended a class member's detention time an average of 112 days. J.A. 81 (Table 12).

Cases with potentially meritorious defenses to removal already challenge the immigration system by requiring careful legal analysis and thorough factual review. Detaining immigrants for prolonged periods without a bond hearing simply piles on to those challenges.

C. Prolonged Pre-Final-Order Detention Burdens An Already Overburdened Immigration System

Requiring immigrants to be detained for prolonged periods without bond hearings is costly. It eats up resources at a time when our immigration system struggles to deal with constrained budgets and exponentially increasing demand.

The number of immigrants subject to detention has grown markedly over the last twenty years. In 1994, approximately 81,000 non-citizens were detained over the course of the year. *See* Anil Kalhan,

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[10] The report showed that 35% of class members won their cases, versus only 7% of detainees at the Mira Loma detention facility who won their cases for fiscal years 2010-2012. J.A. 122.

Rethinking Immigration Detention, 110 Colum. L. Rev. Sidebar 42, 44-45 (2010). By 2013, that number had risen to 440,557. U.S. Dep't of Homeland Sec., *Immigration Enforcement Actions: 2013* 5-6 (Sept. 2014).[11] The total cost of detention now exceeds $2.2 billion annually, roughly double the cost a decade ago. U.S. Dep't of Homeland Sec., *Budget-in-Brief: Fiscal Year 2017* 5 (2016).[12] Moreover, that amount is nearly *twenty* times the amount budgeted for the Alternatives to Detention Program, which places individuals who do not pose a danger to the community but may be a flight risk in various forms of non-detained, intensive supervision, such as electronic monitoring. *Ibid.* (budgeting $126 million for the program). Yet the Alternatives to Detention Program has nearly twice the daily capacity of immigration detention facilities. *Ibid.* (monitoring

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[11] *Available at* https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf. The Department's reports for fiscal years 2014 and 2015 do not report statistics on detention. A draft report for 2014 suggested a decline in total detentions to 425,478 immigrants. U.S. Immigration & Customs Enforcement, *Fiscal Year 2014 ICE Enforcement and Removal Operations Report—DRAFT*, at 9, *available at* https://assets.documentcloud.org/documents/1375456/ice-draft-report.pdf. And a Justice Department report on the use of restrictive housing reported total detentions of 307,310 immigrants during fiscal year 2015. U.S Dep't of Justice, *Report and Recommendations Concerning the Use of Restrictive Housing*, at 88 (Jan. 2016), *available at* https://www.justice.gov/dag/file/815551/download.

[12] *Available at* https://www.dhs.gov/sites/default/files/publications/FY2017_BIB-MASTER.pdf; *see also* Transactional Records Access Clearinghouse, *Immigration and Customs Enforcement (ICE) Budget Expenditures* (Feb. 2010), *available at* http://trac.syr.edu/immigration/reports/224/include/3.html (showing fiscal year 2006 budget of $1.16 billion for custody operations).

53,000 daily participants versus 31,000 detention beds).

There is no shortage of ways in which that money could be spent to ease the heavy load immigration judges and BIA members currently carry. Each immigration judge now faces an average caseload of 1,900 pending cases. Denise Noonan Slavin & Dorothy Harbeck, *A View from the Bench by the National Association of Immigration Judges*, Federal Lawyer 67, 67 (Oct./Nov. 2016).[13] Past hiring freezes and lower staff wages compared to some similar agencies have also reduced the numbers of available clerks and support staff. *Ibid.* Additionally, judges and staff must work with aging audio recording systems and video teleconferencing equipment. *Id.* at 67-68. Limiting long-term detention to cases warranted by flight risk and danger, as determined in an individualized bond hearing, would free up resources that could be redirected to address these problems.

II. INDIVIDUALIZED BOND HEARINGS MITIGATE THE SYSTEMIC PROBLEMS CAUSED BY PROLONGED PRE-FINAL-ORDER DETENTION

Cases in which an immigrant has been detained for six months or longer are particularly well suited for

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[13] *Available at* http://www.fedbar.org/Publications/The-Federal-Lawyer/Features/A-View-from-the-Bench-by-the-National-Association-of-Immigration-Judges.aspx.

bond hearings. Providing bond hearings to immigrants in such cases is thus an appropriate response to the problems discussed in Section I, *supra*.

In a bond hearing the immigration judge assesses the danger and flight risk posed by each individual. Immigration judges routinely make such assessments during bond redetermination hearings in removal cases not subject to Sections 1225(b) and 1226(a), (c). *See* 8 C.F.R. § 1236.1. Judges also already conduct bond hearings for immigrants seeking asylum who may have entered the country only recently. § 1225(a)(1), (b)(1)(A)(iii); *Matter of X-K-*, 23 I&N Dec. 731, 734-35 (BIA 2005). In fact, immigration judges completed over 250,000 total bond hearings in 2012 and 2013. Executive Office for Immigration Review, U.S. Dep't of Justice, *FY 2013 Statistics Yearbook* A5 (Apr. 2014) (Table 2).[14] These hearings permit experienced judges to make an informed judgment about the risks of releasing a detainee based on employment history, length of residence in the community, family ties, previous record of nonappearance at court proceedings, previous criminal or immigration law history, and other factors. *See, e.g.*, *In re Guerra*, 24 I&N Dec. 37, 40 (BIA 2006). Congress and the courts have long recognized these factors as appropriate indicia of flight risk and danger in pre-trial detention determinations. *See, e.g.*, *United States v. Gonzales Claudio*, 806 F.2d 334, 343 (2d Cir. 1986) (identifying "ties to the community" as "the starting point for assessing risk of flight");

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[14] *Available at* http://www.justice.gov/eoir/statspub/fy13syb.pdf.

United States v. Friedman, 837 F.2d 48, 49-50 (2d Cir. 1988) (no flight risk based on finding that criminal defendant "is a life-long New York resident, that he has no prior criminal record, that he has no passport or known ability to evade surveillance, that he has worked gainfully in the New York area for twenty-five years prior to his arrest, and that he is married and has three children, all of whom live in the New York area.").

When an immigration judge conducts a bond hearing for an immigrant who already has been detained for six months, the judge likely can draw on an even greater depth of information to make her judgment. After six months, the judge will have been working with an immigrant for a considerable time and will be familiar with his or her case. She will have background information on the immigrant's claims. And she will be able to develop a sense of the immigrant's credibility. This is true regardless of whether the immigrant already has been living and working in the United States or is a refugee seeking asylum.

There is no reason to believe that granting individualized hearings would lead to arbitrary releases of detainees presenting serious flight risk or danger to the community. It would simply permit an immigration judge to review whether detention is necessary, without requiring that any particular detainee be released. Any order releasing a detained immigrant would be subject to multiple levels of review. First any ruling releasing a detainee would be subject to review by the BIA and could be stayed pending that review.

8 C.F.R. § 1003.1(b). Second, if the BIA authorizes release, DHS can request further review from the Attorney General. *Id.* § 1003.1(h). Any decision to release a detainee could also be made subject to appropriate conditions of release, which studies show can help dramatically minimize the risk of flight and danger. J.A. 564-65 (DHS witness testifying that program of supervised release achieved near-100% success in his region).

Indeed, bond hearings have already proven successful in other situations. One recent study showed that immigrants released on bond overwhelmingly appeared at subsequent court hearings—more than six out of every seven such immigrants appeared at subsequent hearings. TRAC Report. That appearance rate is higher than the rate for immigrants that enforcement officials themselves decide to release without a bond hearing. *See ibid.* (reporting a combined appearance rate for individuals released either on bond or by enforcement officials of 76.6%, compared to 86% for the subset released on bond). And when immigrants are released subject to additional supervision conditions, as the Ninth Circuit's decision requires immigration judges to consider, appearance rates can be as high as 99%. J.A. 564-65.

Requiring individualized bond hearings in cases of prolonged detention under Sections 1225(b) and 1226(a), (c) would not impose significant additional administrative burden on immigration judges. Under the Ninth Circuit's decision, these hearings would be required only in the small minority of cases in which

detainees are held for six months or more. In addition, bond hearings before immigration judges are subject to streamlined proceedings: bond determinations may be made orally, in writing, or, at the immigration judge's discretion, by telephone. *See* 8 C.F.R. § 1003.19.

For these reasons, individualized bond hearings conducted by immigration judges, and reviewed by the BIA, are an appropriate safeguard against the dangers of prolonged pre-final-order detention.

CONCLUSION

The Ninth Circuit's holding requiring individualized bond hearings for immigrants subject to prolonged detention under Sections 1225(b) and 1226(a), (c) should be affirmed.

Respectfully submitted,

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DAVID JENNINGS, *et al.*,

Petitioners,

v.

ALEJANDRO RODRIGUEZ, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF PROFESSORS OF CONSTITUTIONAL, IMMIGRATION, AND ADMINISTRATIVE LAW AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are ten leading professors of constitutional law, immigration law, and administrative law. *Amici* have substantial expertise related to the due process rights of noncitizens. Several *amici* have published articles and submitted briefs in prior cases in this Court on that topic. *Amici* have a professional interest in ensuring that the Court is fully informed of the jurisprudence and history relevant to this case, which addresses fundamental questions related to the due process rights of noncitizens.

Specifically, *amici curiae* submit this brief to address the Government's reading of this Court's decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). The Government relies on *Mezei* to argue that arriving noncitizens have no due process rights with respect to their prolonged detention. This brief shows that such an overly broad reading of *Mezei* is not justified: it is inconsistent with the history of constitutional and immigration law before *Mezei*; it is undermined by the development of these bodies of law since *Mezei* was decided; and it is not compelled by the *Mezei* opinion itself.

Amici are:

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. The parties have filed with the Clerk letters granting blanket consent to the filing of amicus briefs.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Government relies on *Mezei* to support its position that arriving noncitizens may be held in prolonged — and indefinite — detention, without the right to a bond hearing. In particular, the Government cites *Mezei*'s statement that, for noncitizens "on the threshold of initial entry," "'[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'" 345 U.S. at 212 (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)); Pet. Br. 19.

While *Mezei* — a case decided amid the national security concerns of the early Cold War — is often cited with *Knauff* for the proposition that entering noncitizens have no due process rights with respect to their detention — or perhaps at all — that reading paints with far too broad a brush. Read in its historical context, *Mezei* (like *Knauff*) holds only that the Government is owed great deference in the decision *to admit or exclude* noncitizens. It should not be construed to hold that entrants have no due process right to be free from prolonged confinement, let alone that such individuals have no due process rights at all. Such individuals cannot be treated in a manner that violates this nation's basic constitutional norms.

The position that due process does not apply to arriving noncitizens had little or no precedent in the law before *Mezei*. Indeed, a number of pre-*Mezei* cases specifically held that due process entitles noncitizens in exclusion proceedings to a fair hearing, while other pre-*Mezei* decisions held that the Due Process Clause imposed constitutional limits on

the detention of excludable noncitizens. In these cases, the Court did not recognize sharp distinctions between noncitizens already admitted to the country and those who had not yet entered. Rather, the Court treated these groups as essentially the same for due process purposes and held that *both* groups must be afforded basic procedural fairness.

The overly broad reading of *Mezei* that the Government advances is also inconsistent with the Court's evolving jurisprudence after that case was decided. In subsequent decades, the Court has applied a flexible, functional approach to the extraterritorial reach of the Constitution, which counsels against a bright-line rule that arriving noncitizens are completely outside the protections of the Constitution. The Court has also consistently recognized strict limits on prolonged detention in a variety of civil contexts, including immigration, based on substantive due process. Further, the Court has expanded procedural due process protections under its flexible, balancing approach, encompassing individual interests far less weighty than freedom from prolonged or indefinite detention. These precedents all strongly support the proposition that, while arriving noncitizens may not be entitled to *all* of the process that citizens enjoy, they still are entitled to some, including to procedural protections against indefinite confinement.

Moreover, the Court's recent cases underscore that there is a critical analytical distinction between the Government's power to *exclude* and its power to *detain*. *Mezei* must be construed in the context of these later decisions, which emphasize the serious constitutional problems that prolonged civil deten-

tion presents, both in the immigration context and elsewhere. Even if arriving noncitizens were deemed entirely to lack due process rights with respect to the Government's decision to admit or exclude them, it does not follow that such individuals can be *detained* without basic procedural safeguards. Where, as here, a fundamental liberty interest like freedom from prolonged detention is at stake, entering noncitizens must be afforded some process to contest their continuing confinement.

For these reasons, the Court should reject a reading of *Mezei* that would leave arriving noncitizens either without rights with respect to their detention or wholly beyond the Constitution's reach. The Court should affirm that arriving noncitizens, like the Respondent class members seeking asylum based on a demonstrated credible fear of persecution, cannot be deprived of their liberty for a prolonged period without a meaningful opportunity to be heard.

ARGUMENT

I. Pre-*Mezei*, Noncitizens Seeking Admission Were Entitled To Due Process.

The Court's pre-*Mezei* jurisprudence militates against the broad reading of the case advanced by the Government here. In the years leading up to *Mezei* and *Knauff*, this Court treated arriving noncitizens and noncitizens inside the United States similarly for due process purposes. For *all* noncitizens, the Government's "power to lay down general rules" governing entry to the United States, even if "plenary," was not understood to include the "power to be arbitrary or to authorize administrative officials to be arbitrary." Henry M. Hart, *The Power of Congress*

to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1390-91 (1953). Neither did it prevent the federal courts from ensuring observance of the basic "constitutional guarantee of due process." *Id.*

The relevant history of this Court's due process jurisprudence begins with two decisions from the 1890s, both cited in *Mezei*: *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892), and *Fong Yue Ting v. United States*, 149 U.S. 698 (1893). *Nishimura Ekiu* upheld an executive decision to exclude a Japanese noncitizen, and *Fong Yue Ting* upheld a decision without judicial process to expel a Chinese noncitizen. In each case, the Court rejected the noncitizen's claim that the exclusion and expulsion procedures violated due process. The Court concluded that, "although congress might, if it saw fit, authorize the courts to investigate and ascertain the facts upon which the alien's right to land was made by the statutes to depend, yet congress might intrust the final determination of those facts to an executive officer; and that, if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to reexamine the evidence on which he acted, or to controvert its sufficiency." *Fong Yue Ting*, 149 U.S. at 713 (citing *Nishimura Ekiu*, 142 U.S. at 660).

The Court's conclusion in the early 1890s that exclusion and expulsion decisions could be entrusted solely to executive branch officials was not based on a conclusion that arriving noncitizens lack due process rights. Nor did it reflect something exceptional about the treatment of immigration decisions made by federal officials. Instead, the holdings in *Nishi-*

mura Ekiu and *Fong Yue Ting* were the product of prevailing administrative law and separation of powers principles of their era.

When *Nishimura Ekiu* was decided in 1892, the requirements of due process were intimately linked to nineteenth century separation-of-powers thinking. Characteristic of its era, the decision was based on formal notions about the separation of judicial and executive functions in the constitutional order. As explained in an important article regarding the development of modern administrative law, "a framework that was used throughout the nineteenth century . . . separate[d] matters that required 'judicial' involvement from matters that the political branches could conclusively adjudicate on their own." Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 564 (2007); *see also* Jerry L. Mashaw, *Due Process in the Administrative State* (1985). In other words, some matters were considered judicial, and others executive. The former had to conform to strict procedural rules regarding the presentation and appropriate consideration of evidence — requiring, in essence, a common law trial. But the latter could be entrusted to executive discretion without any particular requirement of procedural fairness.

In line with this understanding, the Court in *Nishimura Ekiu* held that "the final determination of those facts [governing exclusion] may be entrusted by congress to executive officers," 142 U.S. at 660, because it concluded that exclusion and expulsion decisions should not be considered judicial questions. This separation-of-functions reasoning is made clear by the cases on which the Court relied in rejecting

the claim that due process required judicial process.[3] None of the cases on which the Court relied are immigration cases. Instead, they are cases on issues ranging from patents to customs, in which the Court was required to decide whether a claim involved a private right that must be heard by an Article III tribunal or, instead, a public right that could be entrusted to executive officials. *See id.* at 660.[4]

Thus, the due process claims rejected in *Nishimura Ekiu* and *Fong Yue Ting* failed because of then-prevailing views about the separation of judicial

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[3] Thus, as an influential 1940 study of administrative procedures in immigration law recognized: "The only standards of procedure familiar to courts and lawyers of the [1890s] were standards of judicial procedure. The inappropriateness of shackling administrative action — particularly in the fluid exclusionary process — with all the restraints of a civil lawsuit was manifest. . . . The alternative to holding inapplicable the only standards which were familiar, however, seemed at first to be a holding that no standards were applicable." U.S. Dep't of Labor, Sec'y of Labor's Comm. on Admin. Procedure, Report: The Immigration & Naturalization Service 46 (May 17, 1940).

[4] The cases *Nishimura Ekiu* cites are *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827) (replevin); *Phila. & Trenton R.R. Co. v. Stimpson*, 39 U.S. (14 Pet.) 448 (1840) (patent); *Benson v. McMahon*, 127 U.S. 457 (1888) (extradition); *In re Luis Oteiza y Cortes*, 136 U.S. 330 (1890) (extradition); *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855) (customs); and *Hilton v. Merritt*, 110 U.S. 97 (1884) (customs). That said, the decision in *Nishimura Ekiu* to treat exclusion decisions as executive rather than judicial matters is related to the Court's earlier holding, in *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), that a noncitizen's right to reside would not be treated as analogous to traditional common law property rights. *See id.* at 602-03 (starkly contrasting treaties regulating noncitizens' rights in real property with treaties regulating noncitizens' rights of residence).

and executive functions in the nascent administrative state — not because the Court concluded that noncitizens in the exclusion or expulsion context had no due process rights, or no constitutional rights at all. In fact, *Nishimura Ekiu* itself held that noncitizens, even those stopped at the border, possessed constitutional rights: it concluded that a noncitizen "prevented from landing by [an] officer claiming authority to do so under an act of congress, and thereby restrained of his liberty, is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful." *Id.* at 660.[5]

Just a few years after *Nishimura Ekiu* and *Fong Yue Ting*, the Court specifically emphasized that noncitizens were entitled to due process, even within the immigration enforcement context. In *Wong Wing v. United States*, 163 U.S. 228 (1896), the Court struck down a federal immigration statute requiring that some unlawful immigrants be put to hard labor prior to their deportation. The Court held that the Bill of Rights protected noncitizens — even those unlawfully present in the United States — from punishment by the federal government without process consistent with the Fifth and Sixth Amendments. *See id.* at 237 ("[T]o declare unlawful resi-

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[5] As the Court has explained, habeas review conducted during this period was required by the Constitution, because Congress had enacted finality provisions whose effect was to preclude review "*except insofar as it was required by the Constitution.*" *Heikkila v. Barber*, 345 U.S. 229, 234-35 (1953) (emphasis added); *see also INS v. St. Cyr*, 533 U.S. 289, 304-05 (2001) (confirming that review during the so-called "finality period" described in *Heikkila* reflected the minimum review required by the Suspension Clause).

dence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial.").

Within a decade of its decision in *Nishimura Ekiu*, the Court began to retreat from its earlier categorical conclusion that exclusion and deportation decisions could be made without any judicial process, and perhaps without any particular kind of hearing. In *Yamataya v. Fisher*, 189 U.S. 86 (1903), the Court explained that it "has never held . . . that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution." *Id.* at 100. The *Yamataya* Court expressly recognized that the Due Process Clause demands some kind of hearing for noncitizens facing removal, even when they had reached the United States just four days earlier. According to the Court, the due process required for such individuals must, at a minimum, include notice of the charges against them and an opportunity to be heard. *Id.* at 94, 100-01.

The approach taken by the *Yamataya* Court reflected changing attitudes regarding administrative law in the early twentieth century. At the time *Yamataya* was decided, the nineteenth century views of administrative law on which *Nishimura Ekiu* was based were under pressure. *See* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*,

11 Colum. L. Rev. 939, 942 (2011) ("Not until the early decades of the twentieth century did courts embrace the salient features of the appellate review model [of administrative law], which allowed decisional authority to be shared between agencies and courts."); *see also* Jerry L. Mashaw, *Creating the Administrative Constitution* 65-78 (2012) ("[I]t would take more than a century for the [John] Marshallian idea of 'discretion' as 'political' and outside judicial jurisdiction to give way to a more modern understanding of the reach of judicial review of administrative action."). Reflecting these changing perspectives, the *Yamataya* Court departed from the approach typified by *Nishimura Ekiu* of categorically separating judicial decisions that are subject to procedural protections from executive decisions that are not. Instead, the Court explained that the due process owed in executive decisions should be calibrated to the interests at stake. The process due must "be appropriate to the nature of the case upon which . . . officers are required to act." *Yamataya*, 189 U.S. at 101. Once the Court had discarded the categorical separation of judicial and executive decision-making spheres, it made clear that deporting a noncitizen, even one present for just four days, implicates sufficiently important interests to require basic due process protections.

Critically for present purposes, in the years following *Yamataya*, the Court applied the same reasoning to exclusion statutes, construing them to require a fair hearing and to prohibit arbitrary administrative action. For example, in *Kwock Jan Fat v. White*, 253 U.S. 454 (1920), the Court granted relief in an exclusion case on the ground that "the

hearing accorded to the petitioner was unfair and inconsistent with the fundamental principles of justice embraced within the conception of due process of law." *Id.* at 459. Similarly, in *Gegiow v. Uhl*, 239 U.S. 3 (1915), the Court reversed a decision excluding noncitizens because an administrative official had exceeded the scope of his authority, which the Court held was "no better than a decision without a fair hearing." *Id.* at 9-10. Likewise, in *Tang Tun v. Edsell*, 223 U.S. 673 (1912), the Court reviewed an exclusion decision to ensure that the authority of the officers rendering the determination was "fairly exercised, that is, consistently with the fundamental principles of justice embraced within the conception of due process of law." *Id.* at 681-82. And in *Chin Yow v. United States*, 208 U.S. 8 (1908), the Court granted habeas relief from an exclusion order because the Government could not satisfy the "presupposition that the [exclusion] decision was after a hearing in good faith." *Id.* at 12; *cf. Low Wah Suey v. Backus*, 225 U.S. 460, 468 (1912) ("A series of decisions in this court has settled that such [exclusion and deportation] hearings before executive officers may be made conclusive *when fairly conducted.*" (emphasis added)).

While some of these early fair-hearing cases involved claims by arriving passengers that they were citizens, neither the Court's logic nor its language was limited to U.S. citizenship. *Low Wah Suey*, for example, explained that the executive officials were prohibited from "depriv[ing] the *alien* of a fair, though summary, hearing." 225 U.S. at 472 (emphasis added). Moreover, in subsequent cases the Court treated the fair-hearing principles as ap-

plicable in immigration proceedings not involving citizenship claims. *See, e.g.*, *United States ex rel. Tisi v. Tod*, 264 U.S. 131 (1924). Lower courts did likewise. *See, e.g.*, *Hughes v. United States ex rel. Licata*, 295 F. 800, 802 (3d Cir. 1924) (holding, in an exclusion case involving a noncitizen, that under *Chin Yow* "[f]ederal courts have jurisdiction to determine . . . whether, in the circumstances, the alien has been denied a proper hearing and a fair trial"); *Louie Poy Hok v. Nagle*, 48 F.2d 753 (9th Cir. 1931) (granting relief from an exclusion order challenged on the ground that "the [noncitizen] was not accorded a fair hearing (and that the findings and excluding decision were not supported by substantial evidence)").

As the pre-*Mezei* cases suggest, the Court did not recognize sharp distinctions between noncitizens already admitted to the country and those who had not yet entered. To the contrary, the Court treated these groups as largely interchangeable for due process purposes and held that *both* groups are entitled to basic procedural fairness. This is best illustrated by *Low Wah Suey*, *supra*, where the Court applied the same due process analysis to "laws forbidding aliens or classes of aliens *from coming within the United States*," and those "provid[ing] for the *expulsion* of aliens or classes of aliens from its territory." 225 U.S. at 467-68 (emphasis added); *see also Chin Yow*, 208 U.S. at 12 (subjecting "statutes purport[ing] to exclude aliens" to due process-type review).

Leading commentators at the time of these decisions recognized that they established a general principle that noncitizens, whether entering the United States for the first time or not, are entitled to the basic guarantees of due process. A respected ear-

ly twentieth century immigration treatise explained that "[t]he [due process] principles" applicable to noncitizens "are equally applicable to aliens, who, *not having been admitted to the United States* are detained for deportation by executive officers." Clement L. Bouvé, *A Treatise on the Laws Governing the Exclusion and Expulsion of Aliens in the United States* 139-41 (1912) (emphasis added).

A major government report on immigration prepared in 1940 as part of a larger project examining principles of administrative procedure echoed this conclusion. *See* U.S. Dep't of Labor, Sec'y of Labor's Comm. on Admin. Procedure, Report: The Immigration & Naturalization Service (May 17, 1940). The report documented the rise during the first decades of the twentieth century of a general principle — applicable in both exclusion and expulsion proceedings — that immigration procedures must be fair and reasonable. *See id.* at 45. Moreover, it characterized that requirement as "nothing less than a transformation in judicial doctrine when compared with the doctrines enunciated in the *Nishimura Ekiu*, *Fong Yue Ting* and immediately succeeding cases." *Id.* In the time period leading up to *Knauff* and *Mezei*, therefore, courts and commentators widely recognized that exclusion and deportation decisions required administrative hearings consistent with fundamental fairness (as well as judicial oversight) to satisfy due process.[6]

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[6] Moreover, as the Court held in *Wong Wing*, lower courts continued to understand the Due Process Clause to protect more than just a noncitizen's right to a hearing on the question whether she would be excluded or deported. In a number of (continued...)

II. Post-*Mezei* Developments In The Law Confirm That Detention Of Entering Noncitizens Must Comport With Due Process.

This Court's decisions since *Mezei* have only made clearer that due process should apply to noncitizens on the threshold of entry, especially when deprivation of physical liberty is at issue. *First*, the Court has extended the Constitution's protections to noncitizens well beyond the nation's borders, an approach at odds with holding that arriving noncitizens are unprotected by the Due Process Clause. *Second*, the Court has developed important limits on civil confinement — including in the immigration context — reinforcing its longstanding view that a person's physical confinement at the hands of the Government implicates fundamental liberty interests protected by the Due Process Clause. *Third*, the Court has completed the due process revolution sparked by

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cases, for example, lower courts specifically limited the length of arriving noncitizens' detention on due process grounds. *See, e.g., Petition of Brooks*, 5 F.2d 238, 239 (D. Mass. 1925) (power to exclude and deport does not include power to detain indefinitely); *Staniszewski v. Watkins*, 80 F. Supp. 132, 135 (S.D.N.Y. 1948) (ordering release of noncitizen seaman detained at Ellis Island for almost seven months); *In re Krajcirovic*, 87 F. Supp. 379, 382 (D. Mass. 1949) (limiting immigration detention of noncitizen seized at the border to two months from date of court's exclusion decision on ground that "wherever the Constitution of the United States is applicable, and that includes ports of entry, an alien as well as a citizen is guaranteed that he will not be deprived of his liberty without due process of law"); *United States ex rel. Chu Leung v. Shaughnessy*, 88 F. Supp. 91, 92 (S.D.N.Y. 1950) (suggesting reasonable limit on time noncitizen may be detained even where exclusion not possible to effectuate).

the growth of the administrative state in the early twentieth-century, cementing procedural due process protections for legal interests far less compelling than the fundamental liberty interest in being free from prolonged detention.

A. This Court's Modern Approach To Extraterritoriality Counsels Against Withholding Protection From Detained Entrants.

Recent decisions regarding the Constitution's extraterritorial scope make clear that noncitizens on the threshold of entry cannot, consistent with this Court's case law, be deemed wholly outside the protection of the Due Process Clause.

Since *Mezei*, the Court has repeatedly rejected any bright-line rule making constitutional protections categorically inapplicable to persons outside the nation's borders. Instead, the Court assesses questions of extraterritorial application in a functional manner, an approach that cannot be squared with a blanket rule that inadmissible noncitizens are at the unfettered whim of executive officials.

Shortly after *Mezei*, the Court expressly rejected the theory that constitutional protections stop at the water's edge. In *Reid v. Covert*, 354 U.S. 1 (1957), the Court recognized that the constitutional right to jury trial encompassed those abroad. *See, e.g., id.* at 8 (plurality opinion) ("This Court and other federal courts have held or asserted that various constitutional limitations apply to the Government when it acts outside the continental United States.").

In *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the majority held that the Fourth

Amendment did not apply to the seizure of a noncitizen's property occurring entirely abroad. The Court, however, expressly contrasted the Fourth Amendment, which it held applies only to "the people" who are part of the national community, with the Fifth Amendment, which applies more broadly to all "persons." *Id.* at 265-66. Justice Kennedy's controlling opinion embraced a functional test, asking whether it would be "impracticable and anomalous" for the Fourth Amendment's requirements to apply in the relevant circumstances. *Id.* at 278 (Kennedy, J., concurring).

More recently, in *Boumediene v. Bush*, 553 U.S. 723 (2008), Justice Kennedy, now writing for the majority, expanded upon the "impractical and anomalous" test. In holding that the Constitution's Suspension Clause, Art. I, § 9, cl. 2, applies to noncitizens held at Guantanamo Bay, Cuba, the Court explained that "extraterritoriality questions turn on objective factors and practical concerns, not formalism." *Id.* at 727. "Even when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.'" *Id.* at 765 (quoting *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885)). Whether the Constitution applies outside the United States does not depend on formalistically determining whether the U.S. Government exercises *de jure* sovereignty over the territory in question. The issue rather is whether there exist "practical barriers" to affording a particular constitutional protection to individuals subject to Government control who are outside the nation's borders. *Id.* at 770. Absent such

"practical barriers," the Government's extraterritorial conduct is subject to constitutional constraint.

With *Boumediene*, the Court thus clarified that a functional approach determines the extraterritorial application of the Constitution. This functional approach requires that noncitizens on the threshold of entry be afforded due process protection against prolonged detention. Since this Court no longer views the *reality* of extraterritorial detention as preventing the Constitution from applying, the legal fiction of an alien standing "at the threshold of entry" necessarily cannot have that result. Noncitizens held at the border by U.S. authorities are subject to the Government's control, and there are no "practical barriers" to affording them due process rights with respect to their prolonged detention. Accordingly, there is no basis for allowing their prolonged detention without any due process protection.

B. Since *Mezei*, This Court Has Recognized Strict Limits On Indefinite Civil Detention, Including In The Immigration Context.

This Court's modern substantive due process cases expressly recognize the importance of an individual's interest in being free from prolonged detention, underscoring that it is not a mere "privilege" outside the scope of the Due Process Clause. These cases hold that civil detention must be limited to a narrow class of individuals and must be subject to rigorous procedural safeguards.

As the Court explained in *Foucha v. Louisiana*, 504 U.S. 71 (1992), "[f]reedom from bodily restraint has always been at the core of the liberty

protected by the Due Process Clause." *Id.* at 80. "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). Accordingly, this Court has required that the Government meet a heavy burden before subjecting an individual to prolonged civil confinement. *See, e.g., Kansas v. Hendricks*, 521 U.S. 346, 357 (1997) (commitment requires proof not only of "a mere predisposition to violence" but also "evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated"). Detention may not last longer than necessary to advance the Government's legitimate purposes. *See, e.g., Jackson v. Indiana*, 406 U.S. 715, 738 (1972) ("[T]he nature and duration of commitment must bear some reasonable relation to the purpose for which the individual is committed."); *Hendricks*, 521 U.S. at 363-64 (sexually violent predators committed because their mental abnormality makes them a threat to others may be incapacitated only for as long as that stated purpose remains); *Salerno*, 481 U.S. at 747 (emphasizing "stringent time limitations" on permissible pretrial detention); *see also Schall v. Martin*, 467 U.S. 253, 269 (1984) (pretrial detention of alleged juvenile delinquents "strictly limited in time").

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court applied the principle that civil confinement must be strictly limited in the immigration context. The Court began by recognizing that due process applies to the detention of noncitizens subject to a final order of removal. While the Court noted that "the nature of that protection may vary upon the status

and circumstance," *id.* at 694 (citing *Landon v. Plasencia*, 459 U.S. 21, 32-34 (1982)), it held that even a noncitizen subject to a final order of removal could not be detained for more than a reasonable time to effectuate that order, which presumptively should not exceed six months. *Id.* at 701.[7]

In reaching this result, *Zadvydas* separated a noncitizen's due process right to be free from "long-term detention" from any interest in living in the United States under the immigration statutes. *Id.* at 695-96. The Court recognized that noncitizens who lose their removal cases have no right to live at large in the United States, and that the political branches are fully empowered to remove noncitizens. *Id.* The Court explained, however, that the removal power is not the issue when the Government's exercise of its immigration authority results in the prolonged detention of noncitizens. Rather, detention is a constitutional matter that must be considered separately from "the political branches' authority to control entry into the United States," and must be subject to strict due process limits. *Id.* at 695, 699-701.

C. Modern Procedural Due Process Doctrine Sweeps Far More Broadly Than It Did In The Era Of *Mezei*.

Procedural due process "is a principle basic to our society." *Mathews v. Eldridge*, 424 U.S. 319, 333

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[7] *See also Reno v. Flores*, 507 U.S. 292, 314 (1993) (upholding INS policy of maintaining custody of noncitizen juveniles pending deportation proceedings only where "period of custody [was] inherently limited by the pending deportation hearing" and was expected to last "an average of only 30 days").

(1976) (citation omitted). Since *Mezei*, this Court has significantly broadened the reach of procedural due process protections. Under the modern framework, the Due Process Clause limits the power of the Government in all instances where a Government decision may deprive an individual of his liberty. *See, e.g., Addington v. Texas*, 441 U.S. 418, 425 (1979) (civil commitment); *In re Gault*, 387 U.S. 1, 31-32 (1967) (juvenile delinquency); *In re Oliver*, 333 U.S. 257, 274-75 (1948) (contempt of court); *see also Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1973) (revocation of probation); *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (revocation of parole).

Rather than operating on the basis of formal distinctions between executive and judicial functions, modern procedural due process doctrine employs a flexible, functional analysis that extends the approach foreshadowed in *Yamataya*. *See supra* pp. 10-11. First, the Court analyzes whether the Government's decision implicates a liberty or property interest protected by the Due Process Clause. Second, the Court employs a three-part test to determine which procedures are sufficient to protect that interest against erroneous deprivation, weighing the individual's interest and the benefits of additional procedures against the burdens those procedures would impose on the Government. *See Mathews*, 424 U.S. at 334-35. The weightier the liberty or property interest, the more process that is due; thus, for instance, depriving a person of his fundamental interest in freedom from detention would require substantial process. *Cf. id.*; *Hamdi v. Rumsfeld*, 542 U.S. 507, 529-30, 533 (2004) (plurality opinion).

The Court's opinion in *Landon v. Plasencia*, 459 U.S. 21 (1982), is an example of that revolution in the immigration context. Plasencia was a returning lawful permanent resident stopped at the border and accused of attempting to smuggle others into the United States. *Id.* at 24-25, 30. Despite her status as a potentially excludable alien standing on the threshold of entry, the Court squarely held that Plasencia had an interest protectable under the Due Process Clause. *See id.* at 32. The Court emphasized that the right to reside in the United States is a "weighty" liberty interest protected by due process, where the returning noncitizen "stands to lose the right 'to stay and live and work in this land of freedom.'" *Id.* at 34 (quoting *Bridges v. Wixon*, 326 U.S. 135, 154 (1945)). Following *Mathews*, the Court explained that "[t]he constitutional sufficiency of procedures provided in any situation, of course, varies with the circumstances." *Id.* But it is "[t]he role of the judiciary" to determine whether the administrative hearing used to order Plasencia's exclusion "meet[s] the essential standard of fairness under the Due Process Clause." *Id.* at 34-35.

The Government suggests that *Plasencia* forecloses any due process argument in the present case because the *Plasencia* Court stated in dicta that "'an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application.'" Pet. Br. 19 (quoting 459 U.S. at 32). But this dicta is not a statement that all arriving noncitizens lack rights under the Due Process Clause. Nor is it a conclusion that the prolonged *detention* of an arriving noncitizen implicates no interests protected by the Fifth Amendment. The key

language here is "regarding his application." The Court's dicta means simply that, if one is a noncitizen seeking initial admission, the naked interest in residing in the United States is not alone a "protectable" liberty or property interest under the Due Process Clause. *See* 459 U.S. at 32.

Thus, while it remains an open question whether (or when) the decision to deny admission to a noncitizen abroad or on the threshold of entry might implicate interests protected by the Due Process Clause, *cf. Kerry v. Din*, 135 S. Ct. 2128 (2015), nothing in *Plasencia* supports the Government's view that it need not provide any procedures before depriving an individual on the threshold of entry of her physical liberty for a prolonged period. Where, as here, the issue is the indefinite detention of noncitizens who may have no country to which they may safely return, the liberty interest at stake is indisputably a weighty one. Accordingly, at least some meaningful process is due before a noncitizen can be indefinitely detained.

III. *Mezei* Should Not Be Construed To Hold That Entering Noncitizens Can Be Detained Indefinitely Without Due Process.

The history of this Court's jurisprudence before *Knauff* and *Mezei*, and the legal developments after *Mezei*, allow the decision itself to be understood in its proper context. *Mezei*'s statement, following *Knauff*, that "[w]hatever the procedure authorized by Congress is" "is due process as far as an alien denied entry is concerned," could seemingly support the position that new entrants have no due process rights — or perhaps no constitutional rights at all. 345

U.S. at 212 (citations omitted). But this sentence should be read and construed within the specific context in which it was made. Understood in light of both what came before it and what came after, *Mezei* and *Knauff* do not stand for the blanket proposition for which they have often been cited by the Government. The cases may recognize broad power for the political branches in regulating *entry* to the United States, particularly amid the heightened security concerns in which those cases arose. But they do not address the analytically distinct problem of civil detention at issue in this case and on which this Court has placed meaningful limits in recent decades.

Significantly, the *Mezei* majority did not view the case to be principally about detention. It thus did not specifically address whether indefinite detention without an opportunity to be heard violates the Due Process Clause. The Court did state that the issue to be decided was "whether the Attorney General's continued exclusion of respondent without a hearing amounts to an unlawful detention." *Id.* at 207. But it found in the Government's favor because it determined that the respondent, Mr. Mezei, was not being detained at all; he was merely being "harbored" at Ellis Island because he could not be repatriated. *Id.* at 213. Apart from its recitation of the decision below, *see id.* at 209, the majority did not even mention the word "liberty." For the majority, respondent's "harborage" did not "transform[] this [case] into something other than an exclusion proceeding." *Id.* at 213.

Because the *Mezei* majority did not view the case to be primarily about detention, its holding should not be construed as deciding whether nonciti-

zens on the threshold of entry may be detained indefinitely without a hearing. Thus, when the Court observed that due process for an "alien on the threshold of initial entry" is "[w]hatever the procedure authorized by Congress," it was addressing the "power to expel or exclude aliens," and not the power to detain them indefinitely. *Mezei*, 345 U.S. at 210-12 (citations omitted).

For this reason, the *Mezei* majority's statement should not be afforded the sweeping scope that the Government suggests. It is not properly construed to mean that entering noncitizens have no due process rights whatsoever. Nor is it properly construed to mean that the prolonged detention of such noncitizens does not implicate a liberty interest protected by the Due Process Clause. *See, e.g., id.* at 215 ("we do not think that respondent's *continued exclusion* deprives him of any statutory or constitutional right" (emphasis added)); *id.* at 216 ("respondent's *right to enter* the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate" (emphasis added)).

The opinions of the *Mezei* dissenters underscore that the majority focused on the power to exclude rather than the power to detain. Indeed, the dissenters took issue with the majority on precisely this ground: they argued that the Court *should* have treated the matter before it as involving indefinite detention, and erred by failing to do so.

For Justice Jackson, joined by Justice Frankfurter, the *Mezei* majority wrongly avoided addressing detention based on the "fiction" that Mezei was not in fact detained. *Id.* at 220. According to Justice

Jackson, the Government had "ingeniously argued that Ellis Island is [Mezei's] 'refuge' whence he is free to take leave in any direction exception west." *Id.* But no other country would accept Mezei, with the result that such "freedom" to leave Ellis Island would be meaningful only if Mezei "were an amphibian!" *Id.* In Justice Jackson's view, it "overworks legal fiction to say that one is free in law when by the commonest of common sense he is bound." *Id.* For Justice Jackson, Mezei was plainly "deprived of liberty" and the Court thus should have, but did not, determine whether such deprivation was "a denial of due process of law." *Id.* at 220-21. Justice Black's dissent likewise admonished the majority for ignoring the reality of Mezei's situation, arguing that Mezei was, as a practical matter, being "imprison[ed] without a hearing" in violation of the Due Process Clause. *Id.* at 217-18.[8]

More generally, the notion that noncitizens on the threshold of entry have no due process rights simply cannot be an accurate statement of the law. As Justice Jackson recognized in his *Mezei* dissent, if an arriving noncitizen were entirely outside the protection of the Constitution, then the Government

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[8] It is incorrect to suggest that the *Mezei* Court was "unanimous" that Mr. Mezei could be held as long as needed to effectuate his exclusion. Pet. Br. 20. To the contrary, Justice Jackson recognized the Government's power to exclude, but concluded that "when indefinite confinement becomes the means of enforcing exclusion, . . . due process requires that the alien be informed of its grounds and have a fair chance to overcome them." *Mezei*, 345 U.S. at 227; *see also id.* at 218 (Black, J. dissenting) ("no person . . . native or foreigner . . . can have his . . . liberty . . . taken 'without due process of law'").

could lawfully effectuate the exclusion of such a person by "eject[ing] him bodily into the sea." 345 U.S. at 226. The Court understandably has never embraced a notion so fundamentally at odds with the nation's constitutional norms. Even the dissenters in *Zadvydas*, while taking a more restrictive view of noncitizens' rights than the majority, effectively acknowledged that *all* noncitizens in the custody of immigration authorities have at least *some* due process rights. Justice Scalia was "sure" that even a noncitizen on the threshold of entry "cannot be tortured." 533 U.S. at 704 (Scalia, J., dissenting). And Justice Kennedy recognized that "both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious" — i.e., detention beyond what is "necessary to avoid the risk of flight or danger to the community." *Id.* at 721 (Kennedy, J., dissenting). The appropriate question, therefore, is not *whether* noncitizens on the threshold of entry have due process rights, but rather how much process is due when a fundamental liberty interest like freedom from indefinite detention is at issue.

In short, no rigid principle of constitutional law places an individual's potentially lifelong detention by U.S. authorities beyond all guarantees of due process, merely because she is deemed to stand at the border. The Court should put that myth of *Mezei* to rest. It should confirm that *Mezei* does not authorize the detention of entering noncitizens for any purpose (or no purpose), with no limits, and with no opportunity for review. The Government's proposed reading of *Mezei* as mandating such a result contra-

venes more than a century of case law and the nation's most deeply-held values.[9]

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in Respondents' brief, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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[9] For the reasons explained above, it would be sufficient for purposes of this case to clarify that *Mezei* does not have the broad meaning the Government ascribes to it. However, if the Court considered *Mezei* to unequivocally permit the Government to detain all arriving noncitizens indefinitely, without any hearing at all, *amici* submit that it would be appropriate to overrule *Mezei* in light of the subsequent jurisprudence that contradicts the Government's position.

RECORD AND BRIEFS

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DAVID JENNINGS, et al.,

Petitioners,

v.

ALEJANDRO RODRIGUEZ, et al., individually and on behalf of all others similarly situated,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* COUNTY OF SANTA CLARA, CALIFORNIA, AND 19 ADDITIONAL COUNTIES, CITIES, AND TOWNS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are counties, cities, and towns located throughout the United States. We provide essential services to the residents of our communities – including delivering health care, housing assistance, foster care, and other social safety-net services that enable community members to live healthy and stable lives. We also fund, operate, and oversee the local law enforcement agencies and jail facilities that are responsible for protecting public safety within our communities.

Amici have a substantial interest in the resolution of the questions presented in this case. We are home to some of the largest populations of immigrants in the United States, and have extensive experience serving our diverse communities. Our collective understanding as administrators of local law enforcement agencies and jails demonstrates that while some high-risk individuals should remain in custody pending resolution of their legal proceedings, many individuals – including immigrants – can safely be released, benefiting their families and communities and generating extensive savings for taxpayers. Amici have an interest in seeing that the constitutional norm of individualized review of appropriateness for release pending the resolution of criminal proceedings is likewise respected in the civil immigration context.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission. All counsel of record consented to the filing of *amicus* briefs.

Further, our immigrant residents are valued members of our communities. Many of them are long-time residents of our towns, cities, and counties; make substantial social and economic contributions; and have United States citizen children and other deep local ties. When these community members are subjected to prolonged immigration detention, their families are destabilized and the welfare of their children is jeopardized. When that occurs, amici incur increased obligations to provide costly public services.

SUMMARY OF ARGUMENT

The federal government advances an untenable position: that immigrants may be held in prolonged mandatory immigration detention for months or even years without the opportunity for an individualized bond hearing where their release may be considered by an immigration judge, and where the burden of proof is on the government to justify their continued detention. This position is not only inconsistent with fundamental principles of constitutional law, but also destabilizes families and communities and imposes substantial, needless burdens on taxpayers. Moreover, based on amici's experience in the criminal context, this approach does not enhance public safety and is not necessary to ensure court appearances.

Amici submit this brief to highlight two issues of significant importance to local governments nationwide. First, the experience of local law enforcement agencies across the country demonstrates that providing

civil detainees the opportunity for individualized bond consideration – as criminal defendants are uniformly offered in the pretrial phase of their criminal proceedings – does not negatively affect community safety or the integrity of the court process. Instead, it significantly reduces costs to taxpayers, who currently pay billions of dollars per year to fund unnecessary detention of thousands of immigrants who could safely be released pending resolution of their immigration proceedings. Indeed, the vast majority of states as well as the federal government have enacted criminal bail laws that do not call for consideration of immigration status in assessing an individual's appropriateness for pretrial release – reflecting the widespread wisdom that immigration status is *not* an appropriate proxy for flight risk or risk to public safety.

Furthermore, subjecting immigrants to lengthy mandatory detention without bond hearings undermines the financial, social, and psychological wellbeing of their children and families. Those impacts, in turn, impose significant burdens upon amici by sending children of detained parents into foster care and increasing demands for other child welfare services, public benefits, and criminal justice processes. These costs usurp scarce local resources that could otherwise be used to provide needed services to amici's communities. Indeed, if the procedural protections ordered by the Court of Appeals were universally afforded to immigrant detainees, numerous detainees who do not present a flight risk or pose a danger to the community

could safely be released from custody pending resolution of their immigration proceedings, with commensurate reductions in both federal and local expenditures.

Although the federal government recognizes the well-established constitutional safeguards that limit pretrial detention in the criminal justice system, it incongruously argues that no such protections are required for immigrants subject to prolonged mandatory detention under the *civil* immigration laws. Amici see no basis for categorically foreclosing application of those principles in the civil context, whether in the Constitution or as a matter of sound policy, and strongly support the application of the constitutional norm of an individualized bond hearing to immigrants detained under the statutes at issue in this case.

ARGUMENT

I. Prolonged Mandatory Detention Without an Opportunity for Bond Hearings Violates Constitutional Norms that Exist in the Criminal Context, and Harms Local Communities' Interests in Avoiding Unnecessary Detention

The federal government asserts that guaranteeing bond hearings to immigrants who are subject to prolonged mandatory detention would undermine the enforcement of immigration law by creating undue risks

of flight and re-offense.[2] In advancing this argument, the federal government erroneously presumes that categorical detention is necessary and appropriate to prevent those undesirable outcomes. In fact, prolonged mandatory detention without an opportunity for bond consideration violates foundational constitutional norms that have long existed in the criminal context. Further, amici's experience demonstrates that such a sweeping and absolute approach to detention is wholly unnecessary, and indeed can cause substantial harm.

Amici operate local sheriff's offices, police departments, jails, probation departments, district attorney's offices, and other criminal justice agencies. As local governments responsible for oversight and operation of law enforcement agencies, amici share the federal government's interest in protecting public safety, ensuring compliance with the law, and safeguarding the integrity of the judicial system. Both amici and the federal government, therefore, have an interest in the adoption of laws and policies that discourage and prevent flight and re-offense by individuals awaiting adjudication, whether those proceedings arise from criminal charges or civil immigration charges.

Amici's collective experience as administrators of local criminal justice systems, along with the bulk of empirical research, demonstrates that while some high-risk individuals appropriately remain in custody pending resolution of proceedings, many others –

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[2] Petitioners' Merits Brief 22, 32-33, 47.

including immigrants – can be released following consideration of their individual facts and circumstances without an adverse impact on safety or court appearance rates.[3] The norm of individualized consideration for release is an important constitutional principle in the criminal context, and there is no sound basis on which to disregard this core principle wholesale in the civil immigration context.

1. The administration of justice in any system, civil or criminal, requires the provision of basic procedural protections before an individual may be detained. "Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause protects."[4] Whether detention is civil or criminal in nature, "due process requires that the

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[3] *See, e.g.*, Timothy P. Cadigan et al., *The Re-validation of the Federal Pretrial Services Risk Assessment*, 3-4 (2012), http://www.pretrial.org/download/risk-assessment/The%20Re-validation%20of%20the%20Federal%20Pretrial%20Services%20Risk%20Assessment%20%28PTRA%29%20-%20Cadigan%20et%20al%202012.pdf; Pretrial Justice Institute, *Report on Impact of House Bill 463: Outcomes, Challenges, and Recommendations*, 6, 10 (2012), http://www.pretrial.org/download/law-policy/Kentucky%20Pre%20Post%20HB%20463%20First%20Year%20Pretrial%20Report.pdf; Pretrial Services Agency for the District of Columbia, Office of Strategic Development, *Freedom and Money – Bail in America*, https://www.psa.gov/?q=node/97.

[4] *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[5]

In the criminal context, it is well-settled that pretrial detention can be imposed consistent with constitutional due process principles only when preceded by "numerous procedural safeguards," including a hearing at which the potential detainee has the right to be represented by counsel, to testify and present witnesses, and to cross-examine adversary witnesses; and at which the government must prove by clear and convincing evidence that detention is necessary to prevent flight and/or re-arrest.[6] Indeed, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[7]

The laws of all fifty states and the District of Columbia, as well as federal law, guarantee bail hearings for individuals awaiting adjudication of criminal charges.[8] These bail statutes generally offer criminal defendants the right to be considered for release from custody upon providing appropriate assurances that

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[5] *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *see also Zadvydas*, 533 U.S. at 690.

[6] *United States v. Salerno*, 481 U.S. 739, 742, 751-52, 755 (1987).

[7] *Id.* at 755.

[8] *See, e.g., Clark v. Superior Court*, 14 Cal. Rptr. 2d 49, 51 (Cal. Ct. App. 1992); Wash. Rev. Code § 10.21.060; D.C. Code § 23-1322(d); 18 U.S.C. § 3142(a); *Salerno*, 481 U.S. at 747; *see also* Brief of *Amici Curiae* Nat'l Ass'n of Crim. Def. Lawyers et al. 10-13.

they will attend all required court hearings – which may take the form of paying monetary bail, signing an agreement to abide by various court-ordered conditions of pretrial supervision, or simply signing a promise to appear.[9] While no individual is guaranteed release under these systems, the *opportunity* to seek release before a judge is uniformly afforded.

2. Local criminal justice systems throughout the country have demonstrated that the use of empirically based, individually applied risk assessment tools to determine whether an individual should be released prior to trial allows large numbers of individuals to be released without negative effects on public safety or court appearance rates. For example, in 2012, 70% of criminal defendants in the State of Kentucky were released from pretrial custody; 90% of these individuals made all required court appearances, and 92% avoided new arrests.[10] Similarly, in the County of Santa Clara, California, approximately 95% of all criminal defendants who were released on their own recognizance or on pretrial supervision between 2013 and 2016 made all required court appearances, and 99% avoided reoffending.[11] These figures are representative of those

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[9] *See, e.g.*, 18 U.S.C. § 3142(b)-(c), (f); Cal. Penal Code §§ 1270(a), 1275(a)(1).

[10] *See* Pretrial Justice Institute, *Report on Impact of House Bill 463: Outcomes, Challenges, and Recommendations*, 6, 10 (2012), http://www.pretrial.org/download/law-policy/Kentucky%20Pre%20Post%20HB%20463%20First%20Year%20Pretrial%20Report.pdf.

[11] Garry Herceg, Director, Office of Pretrial Services, County of Santa Clara, *Report to PSJC on Release Population Trends*, 15,

in other jurisdictions utilizing evidence-based assessment tools to determine which individuals can safely be released.[12] If this Court concludes, as it should, that immigration detainees must be given periodic bond hearings, federal immigration judges could likewise utilize such tools to identify the population of immigrants who could be released without substantial risk of flight or danger to the community.[13]

3. The benefits of such a ruling would inure not only to the individuals detained and their families and

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17 (2016), http://sccgov.iqm2.com/Citizens/FileOpen.aspx?Type=4&ID=153959&MeetingID=7200.

[12] *See, e.g.*, Marie VanNostrand & Kenneth J. Rose, *Pretrial Risk Assessment in Virginia*, 10, 12 (2009), https://www.pretrial.org/download/risk-assessment/VA%20Risk%20Report%202009.pdf (of the 65% of criminal defendants released system-wide in Virginia using a pretrial risk assessment tool, 93.8% made all court appearances and 97.1% avoided new arrests); Pretrial Services Agency for the District of Columbia, Office of Strategic Development, *Freedom and Money – Bail in America*, https://www.psa.gov/?q=node/97 (in Washington, D.C., 88% of criminal defendants are released from custody prior to trial, and 88% of those released both make all court appearances and avoid new arrests).

[13] Indeed, immigration judges already have access to tools that are utilized in releasing other groups of immigration detainees. Through the Intensive Supervision Appearance Program, which allows certain detainees to be released with supervision, 95-99% of immigrants enrolled in the "full-service component" of the program made their required court appearances – which is equal to or even better than the rates in the state and local criminal justice systems described above. *See* BI Incorporated, *Intensive Supervision Appearance Program*, https://bi.com/immigration-services/; U.S. Government Accountability Office, Report No. GAO-15-26, *Alternatives to Detention*, 30 (2014), http://gao.gov/assets/670/666911.pdf.

communities, but also to the public fisc. Procedural mechanisms guaranteeing consideration for release can significantly reduce public expenditures on costly and unneeded detention. For fiscal year 2014 alone, the federal government requested approximately $2 billion in funding for immigration detention – or about $159 per detained immigrant per day.[14] The actual figure is likely even higher due to ICE's underreporting of costs.[15] A recent study of the risk assessment tool the federal government has developed for use with immigration detainees determined that approximately 50% of immigrants who are currently subject to mandatory detention could safely be released if offered individualized bond consideration.[16] These releases would save $1 billion or more in federal taxpayer dollars annually.[17]

4. The same considerations that have spurred local governments across the country to ensure their pretrial justice systems are achieving the goal of avoiding

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[14] National Immigration Forum, *The Math of Immigration Detention: Runaway Costs for Immigration Detention Do Not Add Up to Sensible Policies*, 2 (2013), http://immigrationforum.org/wp-content/uploads/2014/10/Math-of-Immigation-Detention-August-2013-FINAL.pdf.

[15] *See id.*

[16] Robert Koulish, *Using Risk to Assess the Legal Violence of Mandatory Detention* (2016), http://www.mdpi.com/2075-471X/5/3/30/htm.

[17] National Immigration Forum, *The Math of Immigration Detention: Runaway Costs for Immigration Detention Do Not Add Up to Sensible Policies*, 2 (2013), http://immigrationforum.org/wp-content/uploads/2014/10/Math-of-Immigation-Detention-August-2013-FINAL.pdf; *see also* Joint Appendix 356-57 ¶¶ 32-34.

unnecessary detention apply with full force in the immigration context. It is both unconstitutional and illogical to categorically deny immigrants who are subject to mandatory detention under the statutes at issue in this case the opportunity for individualized judicial consideration of their appropriateness for release, with the burden placed on the government to justify continued detention.

Although the federal government argues against the provision of bond hearings for mandatory immigration detainees, it takes the opposite position in the criminal context. The federal criminal bail statute not only absolutely guarantees a bond hearing, it is inherently structured to promote release, specifying that judges may order pretrial detention *only* after determining – consistent with due process requirements – that no release option would be sufficient to assure court appearances and/or avoid the commission of new offenses.[18] In addition, according to the Office of Probation and Pretrial Services of the Administrative Office of the United States Courts, when criminal defendants are individually assessed for appropriateness for pretrial release, "more defendants [a]re released, on less restrictive conditions, and with no increase in failure-to-appear or rearrest rates."[19]

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[18] *See* 18 U.S.C. § 3142(a), (e); *Salerno*, 481 U.S. at 742.

[19] Timothy P. Cadigan et al., *The Re-validation of the Federal Pretrial Services Risk Assessment*, 3-4 (2012), http://www.pretrial.org/download/risk-assessment/The%20Re-validation%20of%20the%20Federal%20Pretrial%20Services%20Risk%20Assessment%20%28PTRA%29%20-%20Cadigan%20et%20al%202012.pdf.

As this Court and other federal courts have recognized, immigration status, standing alone, is not a "convincing proxy" for the risk of flight or re-offense during periods of release from custody.[20] In *Zadvydas v. Davis*, a case involving civil detention of immigrants following the entry of a removal order, this Court concluded that the possibility of re-offense upon release could not be advanced as a justification for categorical detention because "removable status itself . . . bears no relation to a detainee's dangerousness."[21] And in *Lopez-Valenzuela v. Arpaio*, the Ninth Circuit, sitting en banc, struck down an Arizona state law that categorically denied criminal bail to certain undocumented immigrants on the ground that they inherently "pose[d] an unmanageable flight risk."[22] The Ninth Circuit concluded that "[t]here is no evidence that undocumented status correlates closely with unmanageable flight risk," particularly because "many undocumented immigrants were brought here as young children and have no contacts or roots in another country."[23] This Court denied certiorari.[24] Thus, it is clear as a matter of federal law that immigration status alone is not an indicator of risk.

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[20] *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 786 (9th Cir. 2014) (en banc).

[21] *Zadvydas*, 533 U.S. at 692.

[22] *Lopez-Valenzuela*, 770 F.3d at 782.

[23] *Id.* at 786.

[24] *County of Maricopa, Ariz. v. Lopez-Valenzuela*, 135 S. Ct. 2046 (2015).

Holding that the Constitution requires individualized bond hearings for immigrants subject to prolonged mandatory detention would also be consistent with the overwhelming majority of state criminal bail laws nationwide – those of *forty-five states plus the District of Columbia* – that do not make immigration status a factor in pretrial release decisions. Texas's bail laws, for example, do not mention immigration status at all, focusing instead on the nature and circumstances of the offense, the ability of the accused to make bail, and victim and community safety, as well as: "(1) the accused's work record; (2) the accused's family and community ties; (3) the accused's length of residency; (4) the accused's prior criminal record; (5) the accused's conformity with previous bond conditions; (6) the existence of other outstanding bonds, if any; and (7) aggravating circumstances alleged to have been involved in the charged offense."[25] Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming likewise do not include consideration of immigration

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[25] *See Maldonado v. State*, 999 S.W.2d 91, 93-94 (Tex. App. 1999) (citing Tex. Code Crim. Proc. art. 17.15).

status in their criminal bail and pretrial release decisions.[26] To the extent the five remaining states' criminal bail laws do include consideration of immigration status, they do not use that status to categorically deny release – as the federal government advocates here – but instead embed it within a number of other factors designed to assess more thoroughly each individual's specific risk of flight and re-offense.[27] If immigration

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[26] *See* Ala. R. Crim. Proc. 7.2(a); Alaska Stat. § 12.30.011(c); Ark. R. Crim. P. 9.2(c); Cal. Penal Code § 1275(a)(1); Colo. Rev. Stat. § 16-4-103(4)-(5); Conn. Gen. Stat. § 54-63b(b); Del. Code Ann. § 2105(b); D.C. Code § 23-1322(e); Fla. R. Crim. Proc. 3.131(b)(3); Ga. Code Ann. § 17-6-1(e); Haw. Rev. Stat. § 804-3(b); Idaho Crim. R. 46(c); Iowa Code Ann. § 811.2(2); Kan. Stat. Ann. § 22-2802(8); Ky. Rev. Stat. Ann. § 431.525(1); La. Code Crim. Proc. art. 316; Me. Rev. Stat. Ann. § 1026(4); Md. Code Ann., Crim Proc. § 5-202; Mass. Gen. Laws ch. 276, § 58; Mich. Comp. Laws § 765.6(1); Minn. R. Crim. P. 6.02(2); *Clay v. State*, 757 So. 2d 236, 240 (Miss. 2000); Mo. Ann. Stat. § 544.455(2); Mont. Code Ann. § 46-9-109(2); Neb. Rev. Stat. § 29-901.01; Nev. Rev. Stat. Ann. § 178.4853; N.H. Rev. Stat. Ann. § 597:2; N.J. Stat. Ann. § 2A:162-17; N.M. R. 5-401(C); N.Y. Crim. Proc. Law § 510.30(2); N.C. Gen. Stat. § 15A-534(c); N.D. R. Crim. P. 46(a)(3); Oh. Crim. R. 46(C); *Brill v. Gurich*, 965 P.2d 404, 406 (Okla. Crim. App. 1998); Or. Rev. Stat. § 135.230(7); Pa. R. Crim. Proc. 523(A); R.I. Gen. Laws § 12-13-1.3(c); S.D. Codified Laws § 23A-43-4; Tenn. Code Ann. § 40-11-118(b); Utah Code Ann. § 77-20-1; Vt. Stat. Ann. § 7554(a)(1), (b); Wash. Rev. Code § 10.21.050; W. Va. Code Ann. § 62-1C-3; Wis. Stat. § 969.01(4); Wyo. R. Crim P. 46.1(d).

[27] For example, Arizona's criminal bail law calls for consideration of "[w]hether the accused has entered or remained in the United States illegally" as merely one of a list of 15 factors. *See* Ariz. Rev. Stat. § 13-3967(B). Similarly, Illinois law lists "whether a foreign national defendant is lawfully admitted in the United States of America" or "currently subject to [removal] under the immigration laws of the United States" among more than 30 factors. *See* 725 Ill. Comp. Stat. § 5/110-5(a).

status correlated closely with risk to the community, it stands to reason that many or all states – rather than a very small minority – would mandate its consideration in criminal bail hearings.

The tension between the federal government's position and the experiences of amici and state and local governments around the country can be resolved only by concluding that the longstanding and widely applied norms that favor individualized consideration for pretrial release in the criminal justice system extend to the civil immigration system. Constitutional due process principles, as well as local interests, demand that conclusion.

II. Prolonged Mandatory Detention of Immigrants Without an Opportunity for Bond Hearings Harms Their Families and Communities, and Imposes Significant Costs on Local Governments

As the parties' and other amici's briefs have made amply clear, mandatory detention under the statutes at issue in this case is frequently quite prolonged, including for immigrants with significant family and community ties.[28] These briefs have also detailed the detrimental effect such detention has upon detainees, including physical, psychological, economic, and legal

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[28] *See* Respondents' Merits Brief 6, 8, 20, 22; Brief of *Amici Curiae* 43 Social Science Researchers and Professors 6; Brief of *Amici Curiae* Detained Legal Services Providers 8-10.

harms.[29] Unfortunately, the harms of prolonged mandatory detention do not end with the individuals detained, instead cutting deeply into local communities such as those that amici serve.

1. A large majority of immigrants subject to mandatory detention under the statutes at issue in this case, generally excluding arriving asylum-seekers, have United States citizen children from whom they are separated when placed into detention.[30] Reviews of the immigration enforcement system have concluded that tens to hundreds of thousands of United States citizen children were affected by the detention or removal of a parent in the first decade of the twenty-first century alone.[31]

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[29] *See* Brief of *Amici Curiae* 43 Social Science Researchers and Professors 10-25.

[30] *See* Joint Appendix 554-56 ¶¶ 15-20. In addition, a significant percentage of those who are eventually removed from the country – as many as 25% – are parents of United States citizen children. *See* Heather Koball, Urban Institute, *Health and Social Service Needs of U.S.-Citizen Children with Detained or Deported Immigrant Parents*, 1 (2015), http://www.migrationpolicy.org/research/health-and-social-service-needs-us-citizen-children-detained-or-deported-immigrant-parents; Applied Research Center, *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System*, 11 (2011), http://www.atlanticphilanthropies.org/app/uploads/2015/09/ARC_Report_Shattered_Families_FULL_REPORT_Nov2011Release.pdf.

[31] Dorsey & Whitney LLP, *Severing a Lifeline: The Neglect of Citizen Children in America's Immigration Enforcement Policy*, 21 (2009), http://files.dorsey.com/files/upload/DorseyProBono_SeveringLifeline_ReportOnly_web.pdf.

Prolonged mandatory detention affects the lives of detained immigrants and their children and families in numerous ways. Individuals held in immigration detention facilities are often transferred far away from their families to remote detention sites.[32] Even when detainees are held nearby, they have only limited opportunities to receive family visits, with detention facilities sharply limiting the number of visits permitted, the amount of time per visit, and weekend and evening visits.[33] Those visits that are allowed are often "non-contact" visits in which the detained immigrant must talk to his or her family members through a plexiglass window or by telephone.[34] Already scarce and strained opportunities for visitation are especially rare and limited for detainees in privately run immigration detention facilities, who are 60% less likely than those held in public facilities to receive visits from their children and families.[35]

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[32] Ruben Loyo & Carolyn Corrado, N.Y.U. School of Law Immigrant Rights Clinic, *Locked Up But Not Forgotten: Opening Access to Family & Community in the Immigration Detention System*, 3, 14-15, 23 (2010), http://graphics8.nytimes.com/packages/pdf/nyregion/20100429_detentionreport_April2010.pdf.

[33] *Id.* at 8-9.

[34] Immigration Equality, *Conditions of Detention*, http://www.immigrationequality.org/get-legal-help/our-legal-resources/detention-deportation/conditions-of-detention/.

[35] American Sociological Association, *Private Detention of Immigrants Deters Family Visits, Study Finds* (2016), http://www.asanet.org/press-center/press-releases/private-detention-immigrants-deters-family-visits-study-finds.

The detention of a family member has profound and immediate effects on the lives of family members left in the community, particularly children. Immediate, observable psychological effects on children of detained parents include anxiety, depression, sleeplessness, fear, feelings of isolation, and anger/aggression.[36] Incarceration of a child's parent or other family member is classified as an adverse childhood experience that is linked to wide-ranging negative effects on the child's lifelong health and wellbeing.[37] These lasting effects on a child include increasing his or her likelihood of suffering from depression, suicide attempts, sexually transmitted diseases, cancer, heart disease, chronic lung disease, and broken bones; as well as his or her likelihood

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[36] Kalina Brabeck et al., *The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families – A Report for the Inter-American Human Rights Court*, 84 Am. J. of Orthopsychiatry 496, 498, 500 (2013), https://www.bc.edu/content/dam/files/centers/humanrights/pdf/Brabeck_Lykes_Hunter-2014-J-OrthoPsychsocialKidsYouthMigration.pdf; Ajay Chaudry et al., Urban Institute, *Facing Our Future: Children in the Aftermath of Immigration Enforcement*, 41-49 (2010), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412020-Facing-Our-Future.pdf; Luis H. Zayas, *The Distress of Citizen-Children with Detained and Deported Parents*, 24 J. Child Fam. Stud. 3213, 3221-22 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4667551/pdf/nihms-656770.pdf.

[37] Vincent J. Felitti, MD et al., *The Adverse Childhood Experiences (ACE) Study: Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults*, 14 Am. J. Preventative Medicine 245, 249-51 (1998), http://www.theannainstitute.org/ACE%20folder%20for%20website/4RCH.pdf.

of engaging in risky health behaviors like smoking, alcoholism, and drug use.[38]

If a detained family member is a wage-earner and/or caregiver, his or her detention can also have obvious and severe implications for the family's stability, such as loss of employment, income, and associated health benefits; loss of housing; inability to pay bills; and food insecurity.[39] Children in families that lose their housing when a wage-earning parent or relative is detained often experience deteriorating educational outcomes, and may be forced to transfer schools, resulting in disruptions to their educational progress and social relationships.[40]

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[38] *Id.*; Shanta R. Dube et al., *The Impact of Adverse Childhood Experiences on Health Problems: Evidence from Four Birth Cohorts Dating Back to 1900*, 37 J. Preventative Medicine 268, 274-75 (2003), http://www.traumacenter.org/initiatives/Felitti,%202003,%20The%20impact%20of%20adverse%20childhood%20experiences.pdf.

[39] Kalina Brabeck et al., *The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families – A Report for the Inter-American Human Rights Court*, 84 Am. J. of Orthopsychiatry 496, 498, 501 (2013), https://www.bc.edu/content/dam/files/centers/humanrights/pdf/Brabeck_Lykes_Hunter-2014-J-OrthoPsychsocialKidsYouthMigration.pdf; Ajay Chaudry et al., Urban Institute, *Facing Our Future: Children in the Aftermath of Immigration Enforcement*, 27-39 (2010), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412020-Facing-Our-Future.pdf.

[40] Ajay Chaudry et al., Urban Institute, *Facing Our Future: Children in the Aftermath of Immigration Enforcement*, 49-53 (2010), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412020-Facing-Our-Future.pdf; Kalina Brabeck et al., *The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families – A Report for the Inter-American Human*

2. In addition to the social and financial burdens on families and communities of detained immigrants, prolonged mandatory detention imposes significant costs upon the local governments that serve those families and communities. A study conducted in 2011 conservatively estimated that 5,100 children in foster care nationally – approximately 1.25% of the total number of foster children – were there because they had parents who had been detained or removed through the immigration system.[41] Foster care is extremely costly to the local governments that bear primary responsibility for managing child welfare programs. In 2010, the Public Policy Institute of California found that California and its fifty-eight counties spent $1.35 billion on foster care support payments over the previous two years.[42] Assuming that 1.25% of the foster children receiving these support payments had detained or removed parents – a conservative assumption given California's large immigrant population – immigration

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Rights Court, 84 Am. J. of Orthopsychiatry 501 (2013), https://www.bc.edu/content/dam/files/centers/humanrights/pdf/Brabeck_Lykes_Hunter-2014-J-OrthoPsychsocialKidsYouthMigration.pdf; Kalina Brabeck & Qingwen Xu, *The Impact of Detention and Deportation on Latino Immigrant Children and Families: A Quantitative Exploration*, 32 Hisp. J. of Behav. Sci. 341, 354 (2010), http://journals.sagepub.com/doi/pdf/10.1177/0739986310374053.

[41] Applied Research Center, *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System*, 6 (2011), http://www.atlanticphilanthropies.org/app/uploads/2015/09/ARC_Report_Shattered_Families_FULL_REPORT_Nov2011Release.pdf.

[42] Public Policy Institute of California, *Foster Care in California: Achievements and Challenges*, 3 (2010), http://www.ppic.org/content/pubs/report/R_510CDR.pdf.

detention and removals imposed more than $16.8 million in foster care costs on the State of California and its counties in 2008 and 2009. If costs are included for the full range of child welfare services provided, including caseworker investigation, ongoing social worker engagement, legal proceedings in juvenile dependency court, costs associated with licensing and certification of foster homes, and supportive services for children aging out of foster care, this figure jumps to $67.5 million.[43] While it would be difficult to calculate how much of this cost is attributable to prolonged mandatory detention under the statutes at issue in this case, it is clear that providing an opportunity for bond hearings for immigrants with children could save local governments millions of dollars each year in avoided child welfare services.

3. Detention of immigrants without the opportunity for release has many other wide-ranging social consequences and costs. Amici local governments are responsible, among other things, for the arrest, investigation, and prosecution of crimes and the detention of offenders; for providing mental health care, including substance abuse treatment, to indigent residents; and for administering various benefits to the unemployed. Children with incarcerated parents have been found to be three to four times more likely to engage in criminal activity, and also more likely to suffer from long-term substance abuse and unemployment in adulthood[44] – all of which increases service and cost

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[43] *See id.* at 3-5.

[44] Kalina Brabeck et al., *The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families – A*

burdens on amici. Amici also bear much of the cost of caring for United States citizen children whose performance in school, economic wellbeing, and access to food and shelter may deteriorate when their parents are detained or removed.[45] Amici additionally lose significant tax revenue when immigrants are detained or removed.[46] Although the full costs of these consequences to local governments are difficult to quantify, they are undoubtedly substantial and wide-ranging.

CONCLUSION

Subjecting immigrants to prolonged mandatory detention without bond hearings undermines the financial, social, and psychological wellbeing of their children,

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Report for the Inter-American Human Rights Court, 84 Am. J. of Orthopsychiatry 496, 500 (2013), https://www.bc.edu/content/dam/files/centers/humanrights/pdf/Brabeck_Lykes_Hunter-2014-J-OrthoPsychsocialKidsYouthMigration.pdf.

[45] *See* Heather Koball, Urban Institute, *Health and Social Service Needs of U.S.-Citizen Children with Detained or Deported Immigrant Parents*, 5, 7, 11 (2015), http://www.migrationpolicy.org/research/health-and-social-service-needs-us-citizen-children-detained-or-deported-immigrant-parents; Randy Capps et al., Urban Institute, *Paying the Price: The Impact of Immigration Raids on America's Children*, 44-54 (2007), http://www.urban.org/sites/default/files/publication/46811/411566-Paying-the-Price-The-Impact-of-Immigration-Raids-on-America-s-Children.pdf.

[46] Matthew Gardner et al., Institute on Taxation & Economic Policy, *Undocumented Immigrants' State & Local Tax Contributions*, 1, 3 (2015), http://www.itep.org/pdf/undocumentedtaxes2015.pdf (in 2012, undocumented immigrants alone paid $11.84 billion in state and local taxes, including $3.2 billion in California, $1.5 billion in Texas, $793 million in Illinois, and $300 million in Washington).

families, and the communities in which they live. It also imposes significant burdens on local governments, driving up the need for foster care, increasing demands for public benefits, and compounding criminal justice-related costs. Amici's experience administering criminal justice systems demonstrates that many of these individuals could safely be released with no adverse impact on public safety or court appearance rates. Affording immigration detainees bond hearings at which the government bears the burden of justifying their continued detention not only satisfies well-established constitutional norms, but also prevents waste of taxpayer dollars on unnecessary detention. Amici urge the Court to hold that the Constitution guarantees all immigrants subject to detention the right to such a hearing.

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ECORD
AND
RIEFS

No. 15-1204

IN THE
Supreme Court of the United States

DAVID JENNINGS, *et al.*, *Petitioners*,

v.

ALEJANDRO RODRIGUEZ, *et al.*, *Respondents*.

On Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF 29 U.S. REPRESENTATIVES: CHAIRMAN ROBERT GOODLATTE, CHAIRMAN MICHAEL MCCAUL, CHAIRMAN LAMAR SMITH, BRIAN BABIN, ANDY BIGGS, DIANE BLACK, MARSHA BLACKBURN, DAVE BRAT, MO BROOKS, SCOTT DESJARLAIS, JEFF DUNCAN, BILL FLORES, TRENT FRANKS, PAUL GOSAR, SAM GRAVES, JODY HICE, LYNN JENKINS, WALTER JONES, STEVE KING, DOUG LAMALFA, DOUG LAMBORN, BLAINE LUETKEMEYER, TOM MCCLINTOCK, ROGER MARSHALL, JOHN RATCLIFFE, MIKE ROGERS, DANA ROHRABACHER, KEVIN YODER, AND TED YOHO; AND 2 U.S. SENATORS: CHAIRMAN CHARLES GRASSLEY AND TED CRUZ; AND WASHINGTON LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Constitution requires that aliens seeking admission to the United States who are subject to mandatory detention under 8 U.S.C. § 1225(b) must be afforded bond hearings, with the possibility of release, if detention lasts six months.

2. Whether the Constitution requires that criminal or terrorist aliens who are subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months.

3. Whether the Constitution requires that, in bond hearings for aliens detained for six months under Sections 1225(b), 1226(c), or 1226(a), the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community, whether the length of the alien's detention must be weighed in favor of release, and whether new bond hearings must be afforded automatically every six months.

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INTERESTS OF *AMICI CURIAE*

The *amici curiae* are 31 Members of Congress and a public-interest law firm.[1] This brief responds to the Court's December 15, 2016 order, which requested supplemental briefing on three questions regarding the due-process rights of aliens subject to detention during the pendency of removal proceedings.

Amici curiae Charles Grassley (Iowa) and Ted Cruz (Tex.) are U.S. Senators. Robert Goodlatte (Va.), Michael McCaul (Tex.), Lamar Smith (Tex.), Brian Babin (Tex.), Andy Biggs (Ariz.), Diane Black (Tenn.), Marsha Blackburn (Tenn.), Dave Brat (Va.), Mo Brooks (Ala.), Scott DesJarlais (Tenn.), Jeff Duncan (S.C.), Bill Flores (Tex.), Trent Franks (Ariz.), Paul Gosar (Ariz.), Sam Graves (Mo.), Jody Hice (Ga.), Lynn Jenkins (Kan.), Walter Jones (N.C.), Steve King (Iowa), Doug LaMalfa (Calif.), Doug Lamborn (Colo.), Blaine Luetkemeyer (Mo.), Tom McClintock (Calif.), Roger Marshall (Kan.), John Ratcliffe (Tex.), Mike Rogers (Ala.), Dana Rohrabacher (Calif.), Kevin Yoder (Kan.), and Ted Yoho (Fla.) are Members of the U.S. House of Representatives. Rep. Goodlatte is Chairman of the House Judiciary Committee. Rep. McCaul is Chairman of the House Homeland Security Committee. Rep. Smith is Chairman of the House Science, Space, and Technology Committee. Sen. Grassley is Chairman of the Senate Judiciary Committee.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; blanket letters of consent have been lodged with the clerk.

Washington Legal Foundation (WLF) is a non-profit public-interest law firm and policy center. It regularly appears in this and other federal courts to support the rule of law in immigration proceedings. *See, e.g., Nken v. Holder*, 556 U.S. 418 (2009).

Amici believe that Congress and the Executive Branch must continue to be afforded broad power to detain, pending completion of removal proceedings, those aliens who have been convicted of serious crimes or who arrive at the nation's borders without authorization to enter. Experience has demonstrated that if those aliens are not detained, a large percentage of them will abscond, and a significant majority of the alien felons will commit new crimes before they can be apprehended and their removal proceedings completed.

Amici believe that Congress acted well within its constitutional authority when, in 1996, it prescribed mandatory detention for these two categories of aliens. Congress reasonably determined that mandatory detention was the only means of maintaining public safety and ensuring that the aliens would appear for removal hearings. It reasonably concluded that individual bond hearings were incapable of accurately predicting which aliens could be safely released.

STATEMENT OF THE CASE

Most aliens who are subject to removal proceedings are permitted to live freely in American society while those proceedings are ongoing. Congress has, however, designated two instances in which such aliens "shall" be detained pending completion of those proceedings. First, the longstanding rule is that aliens

who are intercepted while seeking to enter the country and who are "not clearly and beyond a doubt entitled" to admission, "shall be detained" pending a hearing before an Immigration Judge to determine whether the alien should be removed from the country. 8 U.S.C. § 1225(b)(2)(A).[2] Second, in 1986, Congress enacted 8 U.S.C. § 1226(c) to require the detention, pending completion of removal proceedings, of aliens who have established a presence in the United States but have been convicted of certain serious crimes specified in the statute. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208.[3]

Respondents are five aliens who were detained by immigration authorities pending completion of removal proceedings. They do not contest the Government's right to detain them for up to six months while proceedings continue. They assert, however, that once six months have elapsed, the Due Process Clause prohibits continued detention unless the Government demonstrates, through clear and convincing evidence, that the detainee is a flight risk or a danger to the community. They assert, *inter alia*, that §§ 1225(b)(2)(A) and 1226(c) violate their substantive

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[2] The Secretary of Homeland Security is authorized to temporarily parole such aliens into the United States for "urgent humanitarian reasons." 8 U.S.C. § 1182(d)(5)(A).

[3] Congress, in IIRIRA and related legislation, further provided that removal is absolutely mandatory for aliens convicted of particularly serious crimes. IIRIRA eliminated the Secretary's discretion to waive deportation for such aliens. IIRIRA § 304(b) (repealing § 212(c) of the Immigration and Naturalization Act of 1952 (INA)). *See INS v. St. Cyr*, 533 U.S. 289, 297 (2001).

due process rights if those statutes are construed to mandate detention in the absence of individualized flight-risk or danger findings.

The district court certified Respondents as representatives of a class consisting of all noncitizens within the Central District of California detained for more than six months pursuant to §§ 1225(b), 1226(a), or 1226(c) pending completion of removal proceedings (including judicial review of removal orders) and who have not received a hearing before an immigration judge to determine whether their detention is justified based on individualized factors. Pet. App. 5a-6a. The class is currently divided into three subclasses: (1) the "Criminal Subclass" (those aliens subject to mandatory detention under § 1226(c)); (2) the "Arriving Subclass" (those aliens subject to mandatory detention under § 1225(b)(2)(A)); and (3) the "§ 1226(a) Subclass" (those aliens being detained following an Immigration Judge's determination that they were not entitled to release under 8 U.S.C. § 1226(a)).

The Ninth Circuit affirmed in substantial part the district court's grant of permanent injunctive relief to Respondents. Pet. App. 1a-59a. The injunction requires the Government to provide any class member who is subject to "prolonged detention"—six months or more—with a bond hearing before an Immigration Judge; at that hearing, the Government must prove by "clear and convincing evidence" that the detainee is a flight risk or a danger to the community to justify the denial of bond. *Id.* at 4a. The appeals court expanded the scope of the injunction by mandating that: (1) the Immigration Judge's bond decision must consider the length of the class member's past detention because "a

noncitizen detained for one or more years is entitled to greater solicitude than a noncitizen detained for six months," *id.* at 56a; and (2) the Government must provide periodic bond hearings every six months "so that noncitizens may challenge their continued detention as the period of confinement grows." *Id.* at 58a (citation omitted).

Although both § 1225(b)(2)(A) and § 1226(c) prohibit release on bond and do not authorize bond hearings, the Ninth Circuit purported to justify its decision on statutory construction grounds. It concluded that the statutory ban on release applies only during the first six months of detention. It held that the Government's contrary interpretation of the relevant immigration statutes would call into question their constitutionality, and thus "the canon of constitutional avoidance require[d]" rejection of that interpretation. Pet. App. 23a. The initial round of briefing before this Court focused on statutory interpretation issues. The Court's December 15, 2016 order directed the parties to file supplemental briefs focused on whether the Due Process Clause requires that arriving aliens and criminal aliens be afforded individualized bond hearings.

SUMMARY OF ARGUMENT

The temporary detention of a criminal alien by Immigration and Customs Enforcement (ICE) pending completion of removal proceedings does not violate the alien's substantive due process rights. The Court so held in *Demore v. Kim*, 538 U.S. 510 (2003):

> [T]his Court has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process. As we said more than a century ago, deportation proceedings "would be vain if those accused could not be held in custody pending the inquiry into their true character."

538 U.S. at 523 (quoting *Wing Wong v. United States*, 163 U.S. 228, 235 (1896)).

Respondents insist that criminal aliens are entitled to hearings at which their release should be ordered unless the Government can demonstrate that they pose a flight risk or a danger to the community. But *Demore* rejected an identical substantive due process challenge to § 1226(c). The Ninth Circuit's due process analysis ignores this Court's repeated admonition that "the power to expel or exclude aliens [i]s a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (citation omitted). Congress has determined that individualized hearings to determine risk of flight or dangerousness are inappropriate because, it concluded, those risks are substantial among criminal aliens yet cannot be predicted accurately on an individualized basis. *Demore* rejected claims that the Due Process Clause authorizes courts to second-guess that legislative determination in the context of detention during removal proceedings, citing numerous prior Court decisions that have deferred to congressional detention determinations. *Demore*, 538

U.S. at 523-26. Nothing in *Demore* suggests that the constitutional calculus suddenly changes once the detention period exceeds six months.

Aliens who have never been admitted to the United States (and are being detained pending removal under § 1225(b)) have an even weaker substantive due process claim to release. "It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). The reduced constitutional status of arriving aliens in comparison to aliens already within the country makes eminent sense. The latter group has had an opportunity to begin developing ties with our society and assuming rights and responsibilities that resemble those of citizens. In contrast, the Constitution requires nothing more than that an arriving alien be provided an opportunity to return home if he desires to do so. If he persists in requesting admission into the United States, he must abide by the rules established by Congress governing new arrivals. "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

Even if the Court concludes that Respondents are entitled to individualized bond hearings, the Due Process Clause provides no support for the procedural rights mandated by the Ninth Circuit. In support of their claim that the government should bear a "clear and convincing" burden of proof, Respondents cite case law imposing a similar burden when the government seeks to impose a "significant deprivation of liberty" on

citizens. Respondents' Opening Brief ("RO Br.") at 49. Those citations are inapposite. As this Court has routinely noted, "In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Demore*, 538 U.S. at 521 (quoting *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976)).

Nor does the Due Process Clause require, as the Ninth Circuit asserted, that courts provide "greater solicitude" to alien detainees' claims as the period of confinement grows. Pet. App. 56a. Detention pending completion of removal proceedings always has an identifiable endpoint. Moreover, the record is uncontested that lengthy detentions of class members are virtually always the product of an alien's decision to contest an Immigration Judge's removal order—first by appealing to the Board of Immigration Appeals (BIA) and then by petitioning to the federal appeals court for review of the final order of removal. Appeals can be very time consuming. Aliens should not be heard to argue that lengthy detention arising directly from their voluntary decisions to appeal strengthens their due process claims, such that the courts may overrule Congress's mandatory-detention determination. Nor does due process require a new hearing every six months, without regard to whether the alien produces evidence of changed circumstances.

Finally, there exists an alternative basis for reversal: the federal courts lack jurisdiction to hear large portions of Respondents' class claims. The claims of the Criminal Subclass are barred by 8 U.S.C. § 1226(e), which provides that the Government's detention of criminal aliens under § 1226(c) "shall not

be subject to review" in the courts. While *Demore* held that § 1226(e)'s jurisdiction-stripping language was insufficiently specific to deprive federal courts of jurisdiction to consider an individual *habeas corpus* petition filed by an alien detainee, it did so on the basis of its longstanding rule requiring a "particularly clear statement" of congressional intent to suspend *habeas corpus*. *Demore*, 538 U.S. at 517 (citing *St. Cyr*, 533 U.S. at 308-09). But that "clear statement" rule is of limited applicability to Respondents' complaint, which seeks class-wide relief far beyond the relief normally available in a *habeas corpus* proceeding. When construed in the absence of a "clear statement" rule, § 1226(e) unequivocally deprives federal courts of jurisdiction to hear any claims asserted by members of the Criminal Subclass, other than the individual *habeas corpus* claims of named plaintiffs Alejandro Rodriguez and Jose Farias Cornejo. The Ninth Circuit's jurisdiction to hear Respondents' class-wide claims is also barred by 8 U.S.C. § 1252(f)(1), which states that federal appeals courts lack jurisdiction to "enjoin or restrain" enforcement of §§ 1225 and 1226 "other than with respect to the application of such provisions to *an individual alien* against whom proceedings under such part have been initiated." (Emphasis added.)

ARGUMENT

I. THE CONSTITUTION DOES NOT REQUIRE BOND HEARINGS FOR CRIMINAL ALIENS WHO ARE SUBJECT TO MANDATORY DETENTION UNDER 8 U.S.C. § 1226(c)

A. *Demore* Forecloses the Due Process Claims of the Criminal Subclass

Respondents contend that the Due Process Clause requires criminal aliens who are subject to mandatory detention under § 1226(c)—such as Respondents Rodriguez, Farias Carnejo, and other members of the Criminal Subclass—to be afforded bond hearings, with the possibility of release, if detention exceeds six months. The Court considered and rejected that precise substantive due process claim in *Demore*.

The respondent in *Demore*, Hyong Joon Kim, was a permanent resident alien who filed a *habeas corpus* petition challenging his § 1226(c) detention, pending completion of removal proceedings.[4] The Court rejected Kim's substantive due process challenge to the constitutionality of § 1226(c), which mandates detention of aliens convicted of enumerated serious felonies and permits release in advance of removal "only" in one extremely limited circumstance (not relevant here). 8 U.S.C. § 1226(c)(2). The Court held, "Detention during removal proceedings is a

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[4] Kim was subject to removal based on convictions on two charges (burglary and "petty theft with priors") that qualified as "crimes involving moral turpitude." *Demore*, 538 U.S. at 513 & n.1.

constitutionally permissible part of that process." *Demore*, 538 U.S. at 510.

Respondents seek to distinguish *Demore* on two grounds. First, they assert that the average detention time among class members is longer than the detention to which Kim was subjected; accordingly, "the deprivation of liberty at issue here is greater than in *Demore*," and thus "an individualized detention hearing is required to ensure that detention continues to serve its purpose." RO Br. 12-13. Second, they assert that "a large majority of Class members present substantial defenses to removal"—in supposed contrast to Kim, who conceded that his felony convictions rendered him "deportable." RO Br. 13, 19-20 & n.5. Neither assertion meaningfully distinguishes *Demore*.

First, nothing in *Demore* suggests that the Court limited its due process analysis to § 1226(c) detentions lasting less than six months. Indeed, Kim's removal proceedings had already lasted more than four years (thanks in substantial part to Kim's repeated requests for continuances) by the time the Court handed down its detention decision. Immigration authorities detained Kim for 200 days (beginning in February 1999, after his release from California prison) until his release on bond (in August 1999) at the behest of a federal district judge, who held that Kim's mandatory detention under § 1226(c) violated his due process rights. *Demore*, 538 at 515. Thus, Kim's § 1226(c) detention had already lasted more than six months by the time the Court ruled against him, and (as the Court surely recognized) was likely to last even longer following remand. Those facts belie any contention that *Demore* limited its due-process analysis to

detentions lasting less than six months. The Court's due-process analysis was premised on its findings that § 1226(c) detentions have a "definite termination point"—they end as soon as removal proceedings are completed—and serve the Government's interest in "increasing the chance that, if ordered removed, the aliens will be successfully removed." *Id.* at 528-29. Those findings remain true regardless whether (as here and in *Demore*) the detention period exceeds six months.

Second, Kim's concession that he was "deportable" (*i.e.*, that he had been convicted of crimes that rendered him subject to removal) does not serve to distinguish his case from the due-process claims raised by members of the Criminal Subclass. As Respondents concede, most members of the subclass do not dispute that their crimes render them subject to removal. Respondents seek to contrast themselves from Kim by asserting that most subclass members have "substantial defenses to removal"—*e.g.*, they are eligible to seek discretionary relief (such as cancellation of removal) based on their "comparatively minor criminal histories and deep ties to the community." RO Br. 19-20. Those assertions do not raise any meaningful factual distinctions. Kim had lived in the United States virtually his entire life, had been granted permanent resident alien status as a child,[5] had a "comparatively minor" criminal history

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[5] Kim's status as a permanent resident alien suggests that his substantive due process claims were considerably *stronger* than those of the typical member of the Criminal Subclass, many of whom committed their crimes while living in this country as unauthorized aliens.

(burglary and petty theft), and was eligible for (and was seeking) discretionary relief from removal. *Demore*, 538 U.S. at 522 n.6; *id.* at 541-42 (Souter, J., dissenting). The Court nonetheless did not deem those facts sufficient to entitle Kim to a bond hearing with the possibility of release.

Nor does the Acting Solicitor General's August 26, 2016 letter to the Court—correcting statistical information that the Government had submitted to the Court in connection with *Demore*—call into question the validity of that decision. In urging the Court to reject Kim's substantive due process claim, the Government submitted information regarding the average number of days required to complete removal proceedings in 2001 in cases involving an alien detained under § 1226(c). The Government later recomputed the 2001 data, and the August 2016 letter provided the Court with revised average-number-of-days figures. There is no reason to conclude that the Court's due-process holding would have been affected, had the revised figures been supplied while *Demore* was before the Court in 2002-03. Indeed, the revised figures are not substantially different than those supplied for FY 2001, and in some instances demonstrate that removal proceedings were completed, on average, more quickly than originally reported.[6] Nothing in the revised figures undermines

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[6] The August 2016 letter reported that in § 1226(c) cases in FY 2001 in which the alien did not appeal from an adverse decision by the Immigration Judge (roughly 85% of all cases), removal proceedings were completed in a mean time of 34 days and a median time of 15 days. The Government originally had reported somewhat higher averages: 47 and 30 days, respectively.

Demore's conclusions that (in contrast to the indefinite detention questioned by *Zadvydas*), § 1226(c) detention has "a definite termination point" and that "in a majority of cases it lasts for less than the 90 days we considered presumptively valid in *Zadvydas*." 538 U.S. at 529.

B. *Demore* Is Consistent with this Court's Immigration Case Law and Ought Not Be Reconsidered

Demore recognized that aliens living in the United States are entitled to considerable constitutional protections, including a due process liberty interest. It concluded, however, that the Due Process Clause does not grant an alien convicted of serious crimes a substantive right to freedom from detention during removal proceedings based solely on evidence that he may not pose either a flight risk or a danger to society. 538 U.S. at 531. The Court held that Congress reasonably concluded that requiring detention of *all* criminal aliens pending completion of removal proceedings would serve the purposes of immigration law. *Id.* at 528 ("The evidence Congress had before it certainly supports the approach it selected even if other, hypothetical studies might have suggested different courses of action.").[7]

The letter also reported that the mean and median times for disposition of an appeal to the BIA (141 days and 119 days) was slightly higher than originally reported.

[7] The Court noted that "Congress had before it evidence suggesting that permitting discretionary release of aliens pending their removal hearings would lead to large numbers of criminal

Respondents urge the Court to overrule *Demore*, asserting that the decision is out of step with the remainder of the Court's due process jurisprudence. To the contrary, the Court's decision to defer to Congress's determination—that *requiring* detention of criminal aliens is necessary to achieve the purposes of immigration law—is consistent with immigration case law throughout our Nation's history, a history that has stressed the limited role of the courts in immigration matters.

"The power to regulate immigration—an attribute of sovereignty essential to the preservation of any nation—has been entrusted by the Constitution to the political branches of the Federal Government." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 864 (1982). As a result, the Court has "underscore[d] the limited scope of judicial inquiry" into immigration-related matters. *Fiallo*, 430 U.S. at 792. "The power over aliens is of a political character and therefore subject only to narrow judicial review." *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976). As the Court has explained:

> [A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of

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aliens skipping their hearings and remaining at large in the United States unlawfully," *id.* at 528, and evidence that "after criminal aliens were identified as deportable, 77% were arrested at least once more and 45%—nearly half—were arrested multiple times before their deportation proceedings even began." *Id.* at 518.

> government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

Mathews v. Diaz, 426 U.S. 67, 81 n.17 (1976) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952)).

The due process rights asserted by Respondents are not sufficiently overpowering to overcome the Court's strong reluctance to interfere with reasonable immigration rules established by Congress. There may be *individual* cases in which relief under the Due Process Clause is warranted; for example, a case in which detention no longer serves any rational purpose because the Government has needlessly delayed removal proceedings for years with no end in sight. But the extraordinary relief requested by Respondents—declaring a federal immigration statute facially unconstitutional and granting *class-wide* relief for all aliens detained more than six months—is wholly inconsistent with the Court's traditional deference to the political branches.

We focus here on several points that make this case a particularly inappropriate vehicle for judicial challenge to congressional immigration policy.

1. Delay in Completing Removal Proceedings Is Almost Entirely Due to Appeals by Aliens from Adverse Decisions by Immigration Judges

All available evidence indicates that the Government proceeds expeditiously with removal proceedings for detained aliens, thereby minimizing the amount of time that criminal aliens are subject to mandatory detention under § 1226(c). Statistics from the Executive Office of Immigration Review (EOIR) indicate that the mean and median completion times for removal proceedings involving aliens detained under § 1226(c)—in which no appeal is taken from the initial decision of the Immigration Judge (about 85% of all cases)—is far less than six months. *See* EOIR, *Certain Criminal Charge Completion Statistics* (Database as of August 2016). In other words, most criminal aliens quickly receive a ruling from a neutral decisionmaker regarding whether they may remain in the country. If the alien chooses to abide by that decision, his detention will end well short of the six-month mark that (according to the Ninth Circuit) begins to raise due-process concerns.

Immigration proceedings (and thus § 1226(c) detention) will continue only if the Immigration Judge rules against an alien and the alien chooses to appeal that decision. Accordingly, delays beyond six months in § 1226(c) cases virtually always arise because the alien has not accepted the decision of the first neutral decisionmaker and has chosen to appeal. That choice may result in continued detention, but the Constitution has never been understood to protect individuals from having to make such choices. As *Demore* explained:

> Respondent contends that the length of detention required to appeal may deter aliens from exercising their right to do so. ... As we have explained before, however, "the legal system ... is replete with situations requiring the making of difficult judgments as to which course to follow," and even in the criminal context, there is no constitutional prohibition against requiring parties to make such choices.

538 U.S. at 530 n.14 (quoting *McGautha v. California*, 402 U.S. 183, 213 (1971)).[8]

2. Respondents Hold the Keys to Unlock Their Jail Cells

In a very significant sense, aliens detained under § 1226(c) hold the keys to unlock their own jail cells. ICE has no desire to retain custody of removable aliens; its only purposes in taking custody are to promote public safety within this country and to ensure a means of effecting removal. A criminal alien can regain his liberty instantly by agreeing to return to his native country. *See, e.g., Parra v. Perryman*, 172 F.3d 954, 957 (7th Cir. 1999) (detained alien "has the keys in his pocket"); *Doherty v. Thornburgh*, 943 F.2d 204,

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[8] *Demore* also noted Congress's finding that, before adoption of § 1226(c) in 1996, many deportable criminal aliens "filed frivolous appeals in order to delay their deportation. ... '[C]ourt ordered release cannot help but encourage dilatory and obstructive tactics by aliens.'" *Ibid* (quoting *Zadvydas*, 533 U.S. at 713 (Kennedy, J., dissenting)).

212 (2d Cir. 1991) (detained alien "possessed, in effect, the key that unlocks his prison cell"). The quasi-voluntary nature of Respondents' detention significantly weakens their due process claims.

Moreover, in many instances, an alien can leave the country yet continue to litigate his immigration claim from abroad—and then return to the United States if he ultimately prevails in court. Before Congress adopted IIRIRA in 1996, courts of appeals lacked jurisdiction to review the deportation order of an alien who had already left the United States. *See* 8 U.S.C. § 1105a(c) (1994). As explained in *Nken v. Holder*, 556 U.S. at 424, IIRIRA lifted the ban on post-departure adjudication of a petition for review. IIRIRA § 306(b).

The Government generally does not permit an alien who has departed the country to continue to adjudicate claims before an Immigration Judge and the BIA. But if the BIA rejects an alien's claims and a final removal order is entered, the alien need not remain in the country in order to pursue a petition for review in a federal appeals court. Following entry of a final removal order, an alien in detention under § 1226(c) faces a choice: he can seek (and perhaps obtain) a stay of the removal order from the appeals court (but remain in detention); or he can decline to seek a stay (at which point he will be removed forthwith and thereby obtain his liberty) and continue to litigate from abroad. In other words, criminal aliens need not abandon their hope of living in the United States as the price of regaining their liberty.

Individual instances of long-delayed removal proceedings almost always arise due to protracted proceedings in federal court—*i.e.*, during a period when a § 1226(c) detainee could have obtained his freedom by returning to his home country and litigating from abroad. The case of Respondent Alejandro Rodriguez is a good illustration. Following his convictions for car theft and drug possession, ICE took him into custody in April 2004. His hearing before an Immigration Judge and his appeal to the BIA were completed within eight months, and a final removal order was issued in December 2004. Rodriguez filed a petition for review with the Ninth Circuit that same month. Rather than obtaining his liberty by returning to Mexico and pursuing his petition from abroad, Rodriguez sought (and obtained) a stay of removal—thereby ensuring his continued detention. Rodriguez ultimately spent 39 months in detention, but he could have avoided all but eight months of that detention had he opted to pursue his petition from Mexico.

3. ICE Provides Detainees with Individualized Hearings at which They May Assert They Are Not Subject to § 1226(c) Detention

Importantly, § 1226(c) does *not* deny a criminal alien access to an expedited hearing before an impartial decisionmaker. Rather, § 1226(c) merely prohibits a hearing on the issue Respondents wish to contest: whether there is individualized evidence demonstrating that the alien will flee or commit new crimes if released. Congress concluded that detaining *all* criminal aliens is the only way to prevent large numbers of them from fleeing or committing new

crime. Thus it deemed individualized predictive evidence irrelevant.

The Government nonetheless provides an expedited hearing to any § 1226(c) detainee who contends that he is not subject to § 1226(c). As *Demore* explained, at such "*Joseph* hearings":

> [T]he detainee may avoid mandatory detention by demonstrating that he is not an alien, was not convicted of the predicate crime, or that the INS is otherwise substantially unlikely to establish that he is in fact subject to mandatory detention. *See* 8 U.S.C. § 3.19(h)(2)(ii) (2002); *Matter of Joseph*, 22 I. & N. Dec. 799, 1999 WL 339053 (BIA 1999).

Demore, 538 U.S. at 514 n.3. Due process concerns are at a minimum when, as here, the Government affords expedited review before an impartial decisionmaker of every factual issue relevant to a § 1226(c) detention decision.[9] Regardless whether detention of citizens under similar circumstances could pass constitutional

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[9] Respondents argue that expedited *Joseph* hearings are constitutionally inadequate because they do not allow consideration of all issues that Respondents would like to assert, RO Br. 21 n.6. But the only issues they cite (individualized evidence of danger or flight risk, and whether the Government might ultimately exercise its discretion to waive a deportable offense) are not ones that Congress deemed relevant to its determination regarding whether detention will "increas[e] the chance that, if ordered removed, the aliens will be successfully removed." *Demore*, 538 U.S. at 528.

muster, "Congress may make rules as to aliens that would be unacceptable if applied to citizens." *Id.* at 522.

II. THE CONSTITUTION DOES NOT REQUIRE BOND HEARINGS FOR ALIENS SEEKING ADMISSION WHO ARE SUBJECT TO MANDATORY DETENTION UNDER 8 U.S.C. § 1225(b)

The Arriving Subclass consists of aliens who have not yet entered the United States and are subject to mandatory detention under 8 U.S.C. § 1225(b), which states that aliens who are intercepted while seeking to enter the country and who are not "clearly and beyond a doubt entitled" to admission "shall be detained" pending a hearing before an Immigration Judge to determine whether they should be removed from the country. 8 U.S.C. § 1225(b)(2)(A). Mandatory detention of such aliens is not a new policy; it has been in place for well more than a century.

Members of the Arriving Subclass have an even weaker constitutional claim than do members of the Criminal Subclass. The subclass consists almost entirely of arriving aliens who seek entry on the basis of an asylum claim.[10] While the United States is justly

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[10] Arriving aliens who are deemed inadmissible and are determined (following interview by an asylum officer) to lack even a credible fear of persecution in their home country are subject to IIRIRA's "expedited removal" proceedings. Such aliens are "removed from the United States without further hearing," 8 U.S.C. § 1225(b)(1)(A)(i), and thus are never subject to extended detention under § 1225(b)(2)(A). Respondents raise a theoretical claim that some long-term resident aliens might be subjected to

proud of its long humanitarian tradition of providing refuge to those who can demonstrate that they face persecution elsewhere, the Court has never suggested that nonresident aliens possess a constitutional right to asylum. If the federal courts tell Congress that it lacks the power to detain asylum seekers at the border for the period necessary to ascertain the validity of the asylum claim, then Congress may conclude that it should cut back or eliminate asylum admissions.

Because members of the Arriving Subclass have not been admitted to the United States, their Due Process Clause protections are minimal. "It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders." *Zadvydas*, 533 U.S. at 693.[11] An arriving alien may, of course, avoid detention by returning home. But if he persists in requesting admission into the United States, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950). An alien seeking admission "requests a privilege and has no constitutional rights regarding his application, for the

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mandatory detention under § 1225(b)(2)(A) upon returning to the United States after a brief trip abroad, but Respondents identify no such individuals—and no member of the Arriving Subclass meets that description. By Respondents' own estimate, 97% of those subject to extended detention under § 1225(b)(2)(A) are asylum seekers.

[11] Arriving aliens denied admission and being detained pending removal are deemed never to have entered the country. *Ibid*; 8 U.S.C. § 1225(a)(1).

power to admit or exclude aliens is a sovereign prerogative." *Landon v. Plasencia*, 459 U.S. 21, 31 (1982).

The reduced constitutional status of arriving aliens in comparison to aliens already within the country makes eminent sense—the latter group has had an opportunity to begin developing ties with our society and assuming rights and responsibilities that resemble those of citizens. An alien is accorded "an ascending scale of rights as he increases his identity with society." *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950). The Constitution has extended the "privilege of litigation" to aliens living within the United States "only because permitting their presence in the country implied protection." *Id.* at 777-78. Arriving aliens who have not previously been permitted to live in the United States thus have no basis for claiming a right to enter our society while their removal proceedings are pending.

In asserting a due-process right to be released during removal proceedings in the absence of individualized evidence that they pose a flight risk or a danger to society, Respondents Farah and Abdikadir (the representatives of the Arriving Subclass) urge the Court to overturn *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206 (1953), which denied virtually all due-process protection to arriving aliens.[12] Respondents

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[12] *Mezei* involved an alien denied admission by immigration authorities and being held indefinitely at Ellis Island. He had lived in the United States as a resident alien for 25 years before traveling to Europe in 1948. His wife and family remained in Buffalo, and he attempted to return less than two years later.

assert that *Mezei* is out of step with modern due-process case law. RO Br. 29-30. But the Court need not re-affirm *Mezei* in full in order to reject Respondent's due-process claims.

Criticism of *Mezei* has focused largely on its failure to recognize Mr. Mezei's *procedural* due-process claims: the Government excluded him because it claimed that he posed a national security threat, yet it failed to disclose any of its evidence and denied him an opportunity to contest the claim. Respondents make no similar procedural claim here. They were all provided a full and fair hearing at which to demonstrate that they were entitled to asylum. Instead, they assert a substantive due process claim: that the Due Process Clause prohibits their detention during removal proceedings when, as here, the Government does not claim to possess individualized evidence demonstrating flight risk or danger to society.

Four justices dissented in *Mezei*. But the sole basis for their dissents was that the Government had denied Mezei procedural due process. *Mezei*, 345 U.S. at 218 (Black, J., dissenting); *id.* at 227 (Jackson, J., dissenting). Indeed, Justice Jackson explicitly rejected Mezei's claim that his confinement violated substantive due process. He explained:

The practical effect of Mezei's exclusion was detention with no discernable endpoint because he was stateless, and no other country was willing to accept him. *Mezei*, 345 U.S. at 216. The Government told Mezei that he was denied admission as a national security risk, but it denied him a hearing at which he could contest that determination.

> Substantive due process will always pay a high degree of deference to congressional and executive judgment, especially when they concur, as to what is reasonable policy under conditions of particular times and circumstances. Close to the maximum of respect is due from the judiciary to the political departments in policies affecting security and alien exclusion. ... Nor do I doubt that due process of law will tolerate some impounding of an alien where it is deemed essential to the safety of the state. ... Nor do I think the concept of due process so paralyzing that it forbids all detention of an alien as a prevention measure against threatened dangers and makes confinement lawful only after the injuries have been suffered. ... I conclude that detention of an alien would not be inconsistent with substantive due process, provided—and this is where my dissent begins—he is accorded procedural due process of law.

Id. at 222-24. Members of the Arriving Subclass are not being detained based on a finding that they, individually, pose a risk of flight or a danger to society. Rather, they are being detained at the border because they refuse to return home and have not yet demonstrated that they have a right to enter the United States. They are being provided an opportunity to make that showing before an impartial decisionmaker. The Due Process Clause requires nothing more.

III. THE CONSTITUTION DOES NOT REQUIRE THE PROCEDURAL PROTECTIONS MANDATED BY THE NINTH CIRCUIT

Even if the Court concludes that Respondents are entitled to individualized bond hearings, the Due Process Clause provides no support for the procedural rights mandated by the Ninth Circuit. The Constitution does not require, in bond hearings for an alien who has been detained for six months pending completion of removal proceedings, that the alien be released unless the Government demonstrates by "clear and convincing evidence" that the alien is a flight risk or a danger to the community, that the length of the alien's detention be weighed in favor of release, or that new bond hearings be afforded automatically every six months.

The Ninth Circuit held that, at a bond hearing for any alien being held pending completion of removal proceedings, the Government—if it wishes to continue to detain the alien—bears the burden of proving that the alien is a flight risk or a danger to the community, and must meet a "clear and convincing evidence" standard of proof. Pet. App. 52a. It stated, "[T]he Supreme Court has repeatedly reaffirmed the principle that 'due process places a heightened burden of proof on the State in civil proceedings in which the individual interests at stake ... are both particularly important and more substantial than mere loss of money.'" *Ibid* (quoting *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996)). It concluded that "a clear and convincing standard of proof provides the appropriate level of procedural protection in light of the substantial

liberty interest at stake" in this case. *Id.* at 53a (citation omitted). The Ninth Circuit's case citations are inapposite. *Cooper* and all but one of the cases relied on by the Ninth Circuit involved the due process rights of American citizens.[13] As noted above, the Due Process Clause provides significantly fewer protections for resident aliens than for citizens and even fewer for arriving aliens and for aliens (including many of those in the Criminal Subclass) whose presence in the United States is unauthorized.

Imposing the burden of proof on the Government (as well as a heightened standard of proof) makes little sense in the context of bond hearings for detained aliens. Personal details about the alien's life (*e.g.*, strong contacts with family in the United States) are relevant in determining whether he is likely to flee if released from detention. The alien is far more likely to know those details than is the Government. Accordingly, it makes much more sense to require the alien to demonstrate that he will not flee than to require the Government to prove that he is likely to flee. That is particularly true in the case of arriving aliens. Immigration officials are likely to know

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[13] The one exception, *Woodby v. INS*, 385 U.S. 276 (1966), involved the standard of proof imposed on the Government when it seeks to deport an alien already present in the United States. In that case, the Government conceded that immigration statutes imposed on it the burden of proving deportability; the Court's conclusion that the Government was required to meet that burden with "clear and convincing evidence" made no mention of the Due Process Clause. More importantly, unlike the Supreme Court cases involving citizens cited by the Ninth Circuit, *Woodby* had nothing to say about government detention decisions. Nor did *Woodby* address exclusion of arriving aliens.

virtually nothing about a removable alien who arrives at the Nation's borders; if they must bear the burden of demonstrating by clear and convincing evidence that this particular alien is likely to flee if released, then they will be unlikely to prevent release of *any* of the thousands of Arriving Subclass members who appear at the borders each year. Protecting the borders will become all but impossible once unauthorized aliens learn that "asylum" is a magic word that will set you free in the United States.

The Ninth Circuit also held that longer detention "requires more robust procedural protections" and thus that "a noncitizen detained for one or more years is entitled to greater solicitude than a non-citizen detained for six months." Pet. App. 56a. That holding finds no support in this Court's case law. *Demore* makes clear that the Government has a strong interest in ensuring that aliens in removal proceedings do not flee, thereby ensuring that, "if ordered removed, the alien will be successfully removed." 538 U.S. at 528. So long as removal proceedings have a foreseeable endpoint, that interest does not diminish with the passage of time. Indeed, human nature suggests that the likelihood that an alien will abscond increases over time; the urge to flee will increase as the date of a final removal order approaches. Moreover, the point of a bond hearing is to weigh the benefits to the government against the burdens imposed on the alien by continued detention. The burdens of *continued* detention do not vary based on how long the alien has already been detained. Finally, by ordering the placement of more thumbs on the alien's side of the scale as the length of the detention grows, the Ninth Circuit has created a strong incentive to aliens to delay

their removal proceedings as long as possible—with the hope that they eventually can outwait the Government and win their freedom.

The Ninth Circuit also held that the Government "must provide periodic bond hearings every six months so that noncitizens may challenge their continued detention 'as the period of confinement grows.'" Pet. App. 58a (quoting *Diouf v. Napolitano*, 634 F.3d 1081, 1086 (9th Cir. 2011)). Its rationale was similar to its rationale for requiring "greater solicitude" for aliens detained for more than one year. That is, because (according to the appeals court) every passage of an additional six-month increment of time calls further into question the constitutionality of continued detention, periodic bond hearings are a constitutional necessity. *Ibid.* But, as explained above, the passage of time does *not* reduce the Government's interest in maintaining detention (at least as long as removal proceedings are moving forward), and thus this periodic-hearing requirement is not constitutionally mandated.

Amici do not mean to suggest that a second bond hearing is never justified. Indeed, immigration law authorizes aliens who have been ordered detained by an Immigration Judge under § 1226(a) to obtain a second detention hearing by showing that "circumstances have changed materially." 8 C.F.R. § 1003.19(e). That regulation is comparable to bail rights afforded to defendants incarcerated pending trial and more than satisfies whatever due process hearing rights an alien may possess to challenge his continued detention pending removal.

IV. THE FEDERAL COURTS LACK JURISDICTION TO HEAR LARGE PORTIONS OF RESPONDENTS' CLASS CLAIMS

Congress has significantly restricted the jurisdiction of federal courts over immigration matters. In awarding injunctive relief on a class-wide basis against federal immigration officials, the lower courts far exceeded their jurisdiction. That jurisdictional issue provides an alternative basis for reversing the Ninth Circuit.

8 U.S.C. § 1226 governs the "Apprehension and detention of aliens." Section 1226(a) states the general rule: aliens arrested pending a decision on whether they are to be removed from the United States "may" continue to be detained following their arrest or "may" be released on "bond of at least $1,500." Section 1226(c) governs detention of aliens convicted of certain serious crimes; it states that the Government "shall" take such criminal aliens into custody and may release them pending removal only in extremely limited circumstances not relevant here. Section 1226(e), entitled "Judicial review," states in full:

> The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

Demore held that § 1226(e)'s jurisdiction-

stripping language was insufficiently specific to deprive federal courts of jurisdiction to consider an individual *habeas corpus* petition filed by an alien criminal for the purpose of challenging his § 1226(c) detention. 538 U.S. at 516-17.[14] The Court presumed that Congress does not ordinarily intend to bar *habeas corpus* claims of individuals detained by the federal government and applied a "clear statement" rule of construction to § 1226(e): "Where a provision precluding review is claimed to bar habeas review, the Court has required a particularly clear statement that such is Congress' intent. *See INS v. St. Cyr*, 533 U.S. 289, 308-09 (2001)." *Id.* at 517. The Court held that the federal courts possessed jurisdiction to hear *habeas* petitions filed by § 1226(c) detainees because "Section 1226(e) contains no explicit provision barring habeas review." *Ibid.*

But this lawsuit is not limited to *habeas corpus* claims asserted by individual detainees seeking relief from federal detention under the *habeas* statute, 28 U.S.C. § 2241. Respondents' Third Amended Complaint (TAC) also seeks declaratory relief, 28 U.S.C. § 2201-02, and relief under the All Writs Act, 28 U.S.C. § 1651. TAC ¶ 3. It seeks relief on a class-wide basis, including detailed declaratory and injunctive relief that would have the effect of substantially revising the Government's detention procedures. TAC at 31-32. Because such relief is far afield from the typical *habeas* claim, the "clear statement" rule

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[14] Three justices disagreed and would have held that the federal courts lacked jurisdiction to hear the *habeas* petition. 538 U.S. at 533-540 (O'Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in the judgment).

articulated in *Demore* and *St. Cyr* is inapplicable.

If § 1226(e) is construed in accordance with the plain meaning of its language and without reference to the "clear statement" rule, the claims of the Criminal Subclass and the § 1226(a) Subclass are jurisdictionally barred—except for the individual *habeas corpus* claims of Respondents Rodriguez, Farias Cornejo, and Ruelas. Section 1226(e) states that the Government's discretionary application of § 1226 "shall not be subject to review," and that "[n]o court may set aside any action or decision ... regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." The injunction imposing detailed requirements regarding future bond hearings surely qualifies as a decision "regarding ... the grant, revocation, or denial of bond." The only plausible interpretation of that statute is that the federal courts lack jurisdiction to hear Respondents' claims for declaratory relief and class-wide relief and their claims arising under the All Writs Act. If the federal courts determine that the Government's detention of the individual Respondents violates their constitutional rights, they may so rule pursuant to 28 U.S.C. § 2241. But they lack jurisdiction to grant injunctive and declaratory relief that goes beyond ordering the Government to cease detaining the individual Respondents.

The class-wide relief ordered by the Ninth Circuit is also barred by 8 U.S.C. § 1252(f)(1), entitled "Limits on Injunctive Relief," which states:

> Regardless of the nature of the action or claim or of the identity of the party or

> parties bringing the action, no Court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operations of [8 U.S.C. § 1221-1231], other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

The last clause of § 1252(f)(1) prohibited the Ninth Circuit from issuing class-wide injunctive relief with respect to detentions under §§ 1225 and 1226. Instead, the Ninth Circuit was limited to issuing an injunction with respect to the detention of "an individual alien against whom proceedings under such part have been initiated." Section 1252(f) thus barred the class-wide relief granted by the lower courts.

In its decision granting class certification, the Ninth Circuit sought to explain why § 1252(f) did not apply. Pet. App. 120a-126a. It noted that Respondents asserted that their prolonged detention violated § 1226(a) and that the mandatory detention provisions of §§ 1225(b) and 1226(c) did not apply to detentions lasting more than six months. The court held that while § 1252(f) might bar an injunction against enforcement of §§ 1225 and1226 (if, *e.g.*, those statutes were deemed unconstitutional), it did not bar courts from enjoining, on a class-wide basis, conduct "not authorized by the statutes." *Id.* at 124a.

That holding squarely conflicts with the plain language of § 1252(f). The only injunctive relief permitted by § 1252(f) is an injunction "with respect to

the application of [§§ 1225 or 1226] to an individual alien." In other words, an injunction "with respect to the application" of those statutes to a class of aliens *is* barred, regardless whether the aliens assert that the Government is applying the statutes in violation of the terms of the statutes, or assert that the statutes themselves are unconstitutional.

Demore ensures that individual aliens will have a federal forum within which to assert that their continued detention violates their constitutional rights. But the Court should take this opportunity to remind the lower federal courts that their jurisdiction extends no further than the jurisdiction granted to them by Congress and that class-wide relief is inappropriate in immigration cases. As this Court has noted repeatedly, immigration policy is "entrusted to the political branches of government" and is "largely immune from judicial inquiry or interference." *Mathews v. Diaz*, 426 U.S. at 81 n.17.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

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DAVID JENNINGS, ET AL.,

PETITIONERS,

v.

ALEJANDRO RODRIGUEZ, ET AL.,

RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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In the Supreme Court of the United States

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BRIEF OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*[1]

The Office of the United Nations High Commissioner for Refugees (UNHCR) is the organization entrusted by the United Nations General Assembly with responsibility, alongside governments, for providing international protection to refugees and other persons of concern, and for

[1] The parties have consented to the filing of this brief, and their consent letters are on file with the Clerk of Court. No counsel for any party authored this brief in whole or in part, no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no one other than amicus curiae and its counsel made any such monetary contribution.

seeking permanent solutions to refugees' problems.[2] G.A. Res. 428 (V), Annex, Statute of the Office of the UNHCR ¶ 1 (Dec. 14, 1950). UNHCR fulfils its mandate by, *inter alia*, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto." *Id.* ¶ 8(a). UNHCR's supervisory responsibility is also reflected in the Preamble and Article 35 of the Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (*1951 Convention*), and Article 2 of the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (*1967 Protocol*), obligating States to cooperate with UNHCR in the exercise of its mandate and to facilitate its supervisory role.

UNHCR has won two Nobel Peace Prizes for its work caring for people affected by forced displacement. There are 65.3 million such people in the world today. The views of UNHCR are informed by more than six decades of experience supervising the treaty-based system for refugee protection. UNHCR's interpretation of the *1951 Convention* and the *1967 Protocol* are both authoritative and integral to promoting consistency in the global regime for the protection of refugees and others of concern. UNHCR's supervisory responsibility is exercised in part by the issuance of interpretive guidelines on the application of international law, including the *1951 Convention* and the *1967 Protocol*, to refugees and asylum-seekers.

UNHCR has long been concerned with the legality of the detention of asylum-seekers. *See, e.g.*, UNHCR Exec. Comm., *Detention of Refugees and Asylum-Seekers*, No.

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[2] Persons of concern to UNHCR include refugees, asylum-seekers, refugees returning to their homes, stateless persons, and internally displaced persons. *See* UNHCR, Who We Help, http://www.unhcr.org/en-us/who-we-help.html (last visited October 21, 2016).

44 (XXXVII), U.N. Doc. A/41/12/Add.1 (Oct. 13, 1986); UNHCR Exec. Comm., *Conclusion on International Protection*, No. 85 (XLIX), U.N. Doc. A/53/12/Add.1 (Oct. 9, 1998). In 1999, UNHCR issued the *Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers*, which were superseded in 2012 by the *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* (*2012 Detention Guidelines*). The *2012 Detention Guidelines* reflect the current state of international law on the detention of asylum-seekers.

Given UNHCR's long engagement on the legality of the detention of asylum-seekers, it has a specific interest in this matter. As discussed below, this Court should consider the United States' obligations to asylum-seekers under international law in construing the provisions of the Immigration and Nationality Act at issue in this case. UNHCR presents its views on the international law principles governing the detention of asylum-seekers to assist the Court in construing the Act.

SUMMARY OF ARGUMENT

International law obligates States to protect the human rights of persons fleeing persecution. At the core of this case is the United States' obligation to protect individuals, including asylum-seekers, from arbitrary detention. This Court should construe the Immigration and Nationality Act consistently with this obligation.

I. The United States is party to international instruments governing detention of asylum-seekers, including the United Nations Protocol Relating to the Status of Refugees, the International Covenant on Civil and Political Rights, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

UNHCR has supervisory authority for construing States' obligations under the Protocol and the United Nations Convention Relating to the Status of Refugees incorporated therein and has issued authoritative guidance on States' international law obligations to protect refugees and asylum-seekers. In interpreting the statutes at issue in this case, all of which implicate the rights of asylum-seekers, this Court should consider these obligations, as reflected in UNHCR's interpretive guidance.

II. The court of appeals' holding that bond hearings must be provided in cases of prolonged detention is consistent with international law. Under international law, States cannot subject asylum-seekers to arbitrary detention. Although States may detain asylum-seekers in some cases, they may do so only for a legitimate purpose and only if detention is necessary, reasonable, and proportionate in a given case. Assessments regarding the legality of detention must be made by independent decision-makers and not by the detaining authorities. These principles apply with equal force to *all* asylum-seekers, regardless of whether they are detained at the border or inside the country.

III. The procedural safeguards required by the court of appeals in connection with bond hearings correspond with international law. To protect asylum-seekers against arbitrary detention, States bear the burden to justify the legality of an asylum-seeker's detention; States must provide automatic, periodic review of the necessity for the continuation of detention; and a judge must necessarily take into account the accrued length of detention in assessing its legality.

IV. Finally, UNHCR emphasizes that prolonged detention impedes access to asylum and magnifies the risk that individuals with bona fide claims to refugee status

will abandon their claims, thus undermining the United States' compliance with the principle of *non-refoulement*, which requires States to refrain from returning refugees to countries where they will face persecution or a reasonable possibility of serious harm.

ARGUMENT

I. The Immigration and Nationality Act Should Be Interpreted Consistently with the International Law Principles Governing Detention of Asylum-Seekers

The United States has bound itself to international instruments that govern the detention of asylum-seekers. In deciding the questions presented by this case, this Court must construe the applicable statutes consistently with the United States' international law obligations to asylum-seekers to the fullest extent possible. In doing so, it should consider UNHCR's authoritative guidance on the state of international law as it relates to detention of asylum-seekers.

A. The United States Is Party to International Instruments That Govern Detention of Asylum-Seekers

1. The United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (*1951 Convention*) and the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (*1967 Protocol*) are the key international instruments that govern the legal obligations of States to protect refugees. The *1967 Protocol* binds parties to comply with the substantive provisions of Articles 2 through 34 of the *1951 Convention*. *1967 Protocol* art. 1, ¶¶ 1–2. The *1967 Protocol* universalizes the refugee definition in Article 1 of the

1951 Convention, removing the geographical and temporal limitations. *Id.* ¶¶ 2–3. Under the *1951 Convention* and *1967 Protocol*, a refugee is a person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country." *1951 Convention* art. 1, ¶ A(2); *1967 Protocol* art. 1, ¶¶ 2–3.

The core of the *1951 Convention* and *1967 Protocol* is the obligation of States to safeguard the principle of *non-refoulement*, which is the obligation not to return a refugee to any country where he or she faces persecution or a reasonable possibility of serious harm. *1951 Convention* art. 33, ¶ 1. The obligation to safeguard against *refoulement* applies to all refugees, regardless of whether the individual has been formally recognized as a refugee. *See* UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* ¶ 28, U.N. Doc. HCR/1P/4/ENG/REV.3 (Dec. 2011) ("A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition.").

As particularly relevant here, Article 31 of the *1951 Convention* forbids States from restricting the movement of or imposing penalties on persons seeking asylum. *1951 Convention* art. 31. Prolonged detention of asylum-seekers absent sufficient justification or basic procedural safeguards rises impermissibly to the level of a penalty under Article 31. *See* Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection*, *in* Refugee Protection in International Law 185, 195–96 (Erika Feller, et al. eds. 2003); *see also* UNHCR Exec. Comm., *Detention of Refugees and Asylum-Seekers*, No. 44 (XXXVII), U.N.

Doc. A/41/12/Add.1 (Oct. 13, 1986) [hereinafter "UNHCR Conclusion No. 44"].

The United States acceded to the *1967 Protocol* in 1968, *see* 19 U.S.T. 6223, thereby binding itself to the international refugee protection regime contained in the *1951 Convention*. Congress enacted the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, which amends the Immigration and Nationality Act (INA), expressly to "bring United States refugee law into conformance with the [*1967 Protocol*]." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987); *see also Negusie* v. *Holder*, 555 U.S. 511, 537 (2009).

2. The United States is also party to other instruments that speak to detention of asylum-seekers. Article 9 of the International Covenant on Civil and Political Rights (ICCPR) guarantees all persons "the right to liberty and security of person" and prohibits "arbitrary arrest or detention." ICCPR art. 9, ¶ 1, Dec. 16, 1966, 999 U.N.T.S. 171. Article 9 further provides that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." *Id.* art. 9, ¶ 4. The United States ratified the ICCPR in 1992. *See* 138 Cong. Rec. 8070 (1992).

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) similarly obligates States to "prevent in any territory under [their] jurisdiction . . . acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture." Convention against Torture art. 16, ¶ 1, Dec. 10, 1984, 1465 U.N.T.S. 85. The U.N. Committee against Torture has construed the Convention to require that "detainees and persons at risk of torture

and ill-treatment" have access to "judicial and other remedies that will allow them to have their complaints promptly and impartially examined, to defend their rights, and to challenge the legality of their detention or treatment." U.N. Committee against Torture, General Comment No. 2, *Implementation of Article 2 by States Parties* ¶ 13, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008). The United States acceded to the Convention against Torture in 1994. *See* U.N. Depositary Notification C.N.382.1994. TREATIES-6 (1995).

B. UNHCR Has Supervisory Responsibility for Implementation of the Refugee Law Instruments and the Human Rights Protections Embedded Therein

1. As discussed above, UNHCR is responsible for supervising the implementation of the *1951 Convention* and the *1967 Protocol*. *See supra* p.2. In exercising its supervisory responsibility to protect refugees, UNHCR looks to international human rights law to inform the substance of that protection. The preamble to the *1951 Convention* embeds the *Convention* within a broader human rights framework. *See 1951 Convention* at 1. UNHCR's governing body, the Executive Committee (of which the United States has been a member since 1959), has recognized that

> refugee law is a dynamic body of law based on the obligations of State Parties to the 1951 Convention and its 1967 Protocol . . . and which is informed by the object and purpose of these instruments and by developments in related areas of international law, such as human rights and international humanitarian law bearing directly on refugee protection . . . .

UNHCR Exec. Comm., *Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection*, No. 103 (LVI), U.N. Doc. A/AC.96/1021 (Oct. 7, 2005); *see also* UNHCR, *Note on International Protection* ¶ 32, U.N. Doc. A/AC.96/930 (July 7, 2000).

2. UNHCR has issued considerable guidance to clarify States' obligations to refugees and asylum-seekers under international law. UNHCR's guidance draws on international refugee law and human rights principles indicated by the *1951 Convention* and the *1967 Protocol*. These principles include the fundamental protection against arbitrary deprivation of liberty recognized by the international community in the ICCPR and Convention against Torture, as well as more than sixty years of jurisprudence and United Nations interpretation of human rights instruments.

UNHCR has repeatedly addressed States' obligations to refugees and asylum-seekers with respect to the issue of detention. UNHCR's Executive Committee addressed this issue in particular detail in 1985. Invoking Article 31 of the *1951 Convention*, the Executive Committee expressed its "deep concern that large numbers of refugees and asylum-seekers in different areas of the world are currently the subject of detention or similar restrictive measures," and adopted the position that detention of asylum-seekers should ordinarily be avoided. UNHCR Conclusion No. 44. More recently, the Executive Committee stated that it

> [d]eplores that many countries continue routinely to detain asylum-seekers (including minors) on an arbitrary basis, for unduly prolonged periods, and without giving them adequate access to UNHCR

> and to fair procedures for timely review of their detention status; notes that such detention practices are inconsistent with established human rights standards and urges States to explore more actively all feasible alternatives to detention.

UNHCR Exec. Comm., *Conclusion on International Protection*, No. 85 (XLIX), U.N. Doc. A/53/12/Add.1 (Oct. 9, 1998).[3]

In 1999, UNHCR issued the *Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, which were superseded in 2012 by the *Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* (*2012 Detention Guidelines*). The *2012 Detention Guidelines* "reflect the current state of international law" regarding detention of asylum-seekers. *2012 Detention Guidelines* ¶ 1. They are intended to provide authoritative guidance for governments in their elaboration and implementation of asylum and migration policies that involve detention, and for decision-makers, including judges, in assessing the necessity of detention in individual cases. *Id.*

As discussed in more detail below, the *2012 Detention Guidelines* address the situations in which detention of asylum-seekers is permitted under international law and the procedural safeguards that must be provided to ensure that detention is not arbitrary.

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[3] *See also* UNHCR Exec. Comm., *Expulsion*, No. 7 (XXVIII), U.N. Doc. A/32/12/Add.1 (Oct. 12, 1977); UNHCR Exec. Comm., *General Conclusion on International Protection*, No. 3 (XXVIII), U.N. Doc. A/32/12/Add.1 (Oct. 12, 1977).

C. The United States Should Construe the INA Consistently with Its International Law Obligations and UNHCR's *2012 Detention Guidelines*

1. Courts have a responsibility to construe federal statutes in a manner consistent with United States treaty obligations to the fullest extent possible. "It has been a maxim of statutory construction since the decision in *Murray* v. *The Charming Betsy*, 2 Cranch 64, 118 (1804), that 'an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . .'" *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982) (omission in original); *see also The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained . . . by the courts . . . of appropriate jurisdiction . . . ."). This Court thus should construe the INA consistently with the United States' obligations under the *1967 Protocol* and other international treaties to which it is party, including the ICCPR and the Convention against Torture.

In construing statutes pertaining to immigration law, this Court has relied on UNHCR guidance to discern the United States' international law obligations to protect asylum-seekers. *See, e.g.*, *Negusie*, 555 U.S. at 536–37 (referring to UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status*, "to which the Court has looked for guidance in the past"); *Cardoza-Fonseca*, 480 U.S. at 438–39 (looking to the *Handbook* for guidance). As particularly relevant here, Members of this Court have drawn guidance from UNHCR's *Detention Guidelines* in particular. *See Zadvydas* v. *Davis*, 533 U.S. 678, 721 (2001) (Kennedy, J., dissenting) (referring to the *Detention Guidelines* in observing that "both removable

and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious"); *Demore* v. *Kim*, 538 U.S. 510, 555 n.10 (2003) (Souter, J., dissenting) (relying on UNHCR's *Detention Guidelines*).

2. Drawing on international human rights and refugee law principles, as reflected in UNHCR's *2012 Detention Guidelines*, UNHCR offers the comments in this brief to guide the Court's construction of the statutes at issue. The questions before this Court implicate the rights of asylum-seekers in three distinct ways.

First, the Government asks this Court to reverse the court of appeals' holding that persons detained upon arrival under 8 U.S.C. § 1225(b) are entitled to bond hearings before an immigration judge after six months of detention. *See* Pet. App. 39a–45a; Petrs.' Br. 15–29. In the Government's view, members of the Section 1225(b) subclass must be detained indefinitely unless the detaining authority exercises its discretion to release them on parole. Petrs.' Br. 16–18. "The overwhelming majority" of the members of the Section 1225(b) subclass are "asylum seekers who have previously established a credible fear of persecution." Br. in Opp'n 3; *see also* Resps.' Br. 10. Two thirds of all subclass members ultimately were granted relief. Resps.' Br. 10. The court of appeals' holding with respect to the Section 1225(b) subclass thus unquestionably affects persons entitled to protection under the *1951 Convention* and *1967 Protocol*.

Second, the Government challenges the court of appeals' holding that persons detained pending removal under Section 1226(c) are entitled to bond hearings before an immigration judge after six months of detention. *See* Pet. App. 32a–38a; Petrs.' Br. 30–50. The Government asserts that members of the Section 1226(c) subclass must

be detained indefinitely unless the detaining authority determines that release is necessary for witness-protection purposes. *See* Petrs.' Br. 30–31. Section 1226(c) class members have applied for withholding of removal and/or withholding under the Convention against Torture. *See* J.A. 94, tbl. 22. All members of the Section 1226(c) subclass have, by necessity, been convicted of crimes, but many served short sentences for relatively minor offenses that do not exclude them from the protections granted to persons who qualify for asylum and/or withholding of removal. *See* Resps.' Br. 9 (citing J.A. 313–314); 8 U.S.C. §§ 1158(b)(2)(A)(ii) (barring asylum claims only for individuals convicted of "a particularly serious crime"), 1231(b)(3)(B) (barring withholding of removal only for individuals convicted of "a particularly serious crime" and sentenced to at least five years' imprisonment). Detention under Section 1226(c) thus implicates the United States' international law obligations to protect refugees and asylum-seekers.

Third, the Government objects to the court of appeals' holding with respect to procedural aspects of bond hearings provided to *all* class members, whether initially detained under Sections 1225(b), 1226(a), or 1226(c).[4] The court of appeals' holding thus affects the procedural protections available to detained asylum-seekers.

Because UNHCR's mandate is to protect the rights of refugees (including asylum-seekers), the focus of this

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[4] With respect to class members detained under Sections 1225(b) and 1226(c), the court of appeals held that, after six months of detention, the Government's authority to detain such class members shifts to Section 1226(a). Pet. App. 34a–35a, 40a–41a. As a result, the court of appeals' holding with respect to the procedural aspects of bond hearings provided under Section 1226(a) applies to all class members.

brief is asylum-seekers' right to be free from arbitrary detention. UNHCR's statements on this topic should not be viewed to suggest that others do not possess that right.[5] Because the statutes construed by the court of appeals implicate the rights of asylum-seekers, this Court must necessarily consider the United States' international law obligations to protect asylum-seekers in construing those statutes. *Cf. Clark* v. *Suarez Martinez*, 543 U.S. 371, 380–81 (2005) ("[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court.").

II. The Court of Appeals' Interpretation of the INA To Require Independent Review of Detention Is Consistent with International Law

The court of appeals' holding in this case—which requires independent review of the legality of detention after six months of detention—is amply supported by international law. As reflected in the *2012 Detention Guidelines*, international law prohibits arbitrary detention of asylum-seekers. To protect against arbitrariness, a State may detain an asylum-seeker only where detention pursues a legitimate purpose and has been determined to be necessary, reasonable, and proportionate in each individual case. To ensure that States comply with these requirements, international law requires that States provide for

[5] The international law prohibition on arbitrary detention applies to all individuals, regardless of immigration status. *See* ICCPR art. 2, ¶ 1; *id.* art. 9.

review of the legality of detention by an independent decision-maker. Absent such review, detention of asylum-seekers violates international law.

A. International Law Prohibits Arbitrary Detention of Asylum-Seekers

1. It is a basic tenet of international human rights law that "[e]veryone has the right to liberty and security of person" and that "[n]o one shall be subjected to arbitrary arrest or detention." ICCPR art. 9, ¶ 1. This core principle is reflected in Article 9 of the ICCPR and the Universal Declaration of Human Rights. *See id.*; G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 9 (Dec. 10, 1948) [hereinafter "UDHR"] ("No one shall be subjected to arbitrary arrest, detention or exile."). The U.N. Human Rights Committee, the international body charged with interpreting the ICCPR, has specifically clarified that Article 9 of the ICCPR applies to refugees and asylum-seekers. U.N. Human Rights Committee, General Comment No. 35 ¶ 3, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014) [hereinafter "UNHRC General Comment No. 35"]. The United States Government, as party to the ICCPR, is obligated to bring its law and practice in line with this principle of human rights law.[6]

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[6] Although the ICCPR is not self-executing and does "not itself create obligations enforceable in the federal courts," *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 734–35 (2004), U.S. courts look to the ICCPR to determine important questions of human rights law, *see, e.g.*, *Roper* v. *Simmons*, 543 U.S. 551, 576 (2005) (referring to the ICCPR to support the prohibition on capital punishment for juveniles); *Abdullahi* v. *Pfizer, Inc.*, 562 F.3d 163, 176 (2d Cir. 2009) ("Agreements that are not self-executing or that have not been executed by federal legislation, including the ICCPR, are appropriately considered evidence of the current state of customary international law."); *Ma* v. *Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001) (relying on Article 9 of the ICCPR

Reiterating this unequivocal articulation of international law, the *2012 Detention Guidelines* state that the "fundamental human rights" to liberty and security of person "apply in principle to all human beings, regardless of their immigration, refugee, asylum-seeker or other status." *2012 Detention Guidelines* ¶¶ 1, 12. An individual's status as an asylum-seeker is not, by itself, a legitimate reason justifying the use of detention. *Id.* ¶ 32. Seeking asylum is not an unlawful act and thus cannot justify detention. *Id.* ¶ 2; *see also* U.N. Working Group on Arbitrary Detention (WGAD), *United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court* ¶ 116, U.N. Doc. A/HRC/30/37 (July 6, 2015) [hereinafter "*Basic Principles and Guidelines*"] ("[T]here is a right to seek asylum under international law and . . . , given that it is neither an unlawful nor a criminal act, it cannot be invoked as grounds for their detention.").

In light of these principles, and taking into account Article 31 of the *1951 Convention* (which prohibits penalizing refugees on account of irregular entry), "detention of asylum-seekers should normally be avoided and be a measure of last resort." *2012 Detention Guidelines* ¶ 2; *see also id.* ¶ 14 (stating that "liberty" should be "the default position").[7] Other international bodies have recog-

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for the proposition that indefinite detention violates international law).

[7] In *Demore* v. *Kim*, 538 U.S. 510 (2003), this Court stated that, "when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal." *Id.* at 528. That statement does not bear on the legality of the Government's right to detain *asylum-seekers*. Under international law, as implemented in the Refugee Act, States cannot

nized that detention of asylum-seekers should be the exception and not the rule. *See, e.g.*, Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), 2013 O.J. (L 180) 96, 97 [hereinafter "E.U. Directive"] (providing that asylum applicants "may be detained only under very clearly defined exceptional circumstances"); Inter-American Commission on Human Rights, *Report on Immigration in the United States: Detention and Due Process* ¶ 416 (Dec. 30, 2010) ("[D]etention should be the exception.").

2. UNHCR understands that States face an "array of contemporary challenges to national asylum systems" and that each State may rightfully "control the entry and stay of non-nationals on their territory." *2012 Detention Guidelines* ¶ 1. Such control is nevertheless "subject to refugee and human rights standards." *Id.* Those standards include the international law prohibition against arbitrary detention of asylum-seekers. *Id.* ¶ 18.

As an initial matter, detention of asylum-seekers must have "a legitimate purpose." *2012 Detention Guidelines* ¶ 21. "[T]here are three purposes for which detention may be necessary in an individual case, and which are generally in line with international law, namely public order, public health or national security." *Id.* (emphasis omitted); *see also id.* ¶¶ 22–30. Use of detention for other purposes is arbitrary, "even if entry was illegal." *Id.* ¶¶ 21, 31. Imposing detention "to dissuade those who have

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"expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." *1951 Convention* art. 33, ¶ 1; *see* 8 U.S.C. § 1231(b)(3).

commenced their claims from pursuing them," or to deter others from seeking asylum, is unlawful. *Id.* ¶ 32.

In addition, a State must always determine whether detention is necessary, reasonable, and proportionate "in each individual case." *2012 Detention Guidelines* ¶ 34; *see also* WGAD, Deliberation No. 9, U.N. Doc. A/HRC/22/44 (Dec. 24, 2012); *A* v. *Australia*, U.N.H.R.C., U.N. Doc. CCPR/C/59/D/560/1993, ¶ 9.2 (Apr. 30, 1997) (stating, in a case involving prolonged detention of an asylum-seeker, that "the notion of 'arbitrariness'" must "be interpreted more broadly to include such elements as inappropriateness and injustice"). The necessity of detention is determined "in light of [its] purpose," and State authorities cannot act beyond what "is strictly necessary to achieve the pursued purpose in the individual case." *2012 Detention Guidelines* ¶ 34. Reasonableness "requir[es] an assessment of any special needs or considerations in the individual's case." *Id.* The "principle of proportionality requires that a balance be struck between the importance of respecting the rights to liberty and security of person and freedom of movement, and the public policy objectives of limiting or denying these rights." *Id.*

The principles of necessity, reasonableness, and proportionality require that a detention decision "be based on an assessment of the individual's particular circumstances." *2012 Detention Guidelines* 15 (Guideline 4). As a result, "[m]andatory or automatic detention" of asylum-seekers is per se arbitrary. *Id.* ¶ 20. "It has been widely held that mandatory or non-reviewable detention of refugees and asylum-seekers is incompatible with international law." UNHCR, *Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons* ¶ 5 (2011) [hereinafter "*Global*

Roundtable"]; *see, e.g.*, *Velez Loor* v. *Panama*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 171 (Nov. 23, 2010) ("[M]igratory policies based on the mandatory detention of irregular migrants, without ordering the competent authorities to verify, in each particular case and by means of an individualized evaluation, the possibility of using less restrictive measures to achieve the same ends, are arbitrary."); *C* v. *Australia*, U.N.H.R.C., U.N. Doc. CCPR/C/76/D/900/1999, ¶ 8.2 (Nov. 13, 2002) (concluding that "continuance of immigration detention for over two years without individual justification" was arbitrary); *A* v. *Australia*, U.N.H.R.C., ¶ 9.4 (finding that detention of an asylum-seeker was arbitrary because the State failed to advance "any grounds particular" to his case).[8]

3. States have tools, including alternatives to detention, with which to balance asylum-seekers' right to liberty and States' legitimate interests in appropriate cases. "The consideration of alternatives to detention . . . is part of an overall assessment of the necessity, reasonableness and proportionality of detention . . . ." *2012 Detention Guidelines* ¶ 35 (emphasis omitted). "[D]etention can only be justified where other less invasive or coercive measures have been considered and found insufficient to safeguard the lawful governmental objective pursued by detention, such as national security or public order." *Global Roundtable* ¶ 3; *see also* G.A. Res. 63/184, Protec-

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[8] The U.N. Human Rights Committee has expressed concern that the United States' practice of subjecting migrants to "mandatory detention . . . for prolonged periods of time without regard to the individual case may raise issues under article 9 of the [ICCPR]." U.N. Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of the United States of America* ¶ 15, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014).

tion of Migrants ¶ 9 (Dec. 18, 2008); UNHCR, *Canada/USA Bi-National Roundtable on Alternatives to Detention of Asylum Seekers, Refugees, Migrants and Stateless Persons* 2 (2012). Consideration of alternative measures "ensures that detention of asylum-seekers is a measure of last, rather than first, resort." *2012 Detention Guidelines* ¶ 35; *see also C* v. *Australia*, U.N.H.R.C., ¶ 8.2. Accordingly, even in cases where some restriction on liberty is justified, a State must consider whether alternatives to detention are sufficient to achieve the State's goal. Of course, alternatives to detention that restrict an asylum-seeker's liberty are subject to the same human rights standards discussed herein. *See 2012 Detention Guidelines* ¶¶ 36–37.

Alternatives to detention can take many forms, including bond or bail, reporting conditions, registration or deposit of documents, community supervision, electronic monitoring, or home curfew. *Global Roundtable* ¶ 20; *see also 2012 Detention Guidelines* Annex A.[9] Such alternatives are "considerably less expensive than detention." *Global Roundtable* ¶ 17. Research has shown that when people are released under proper supervision, a 90 percent compliance rate can be achieved. *Id.* ¶ 16. The U.S. Government's experience with alternatives to detention also has shown them to be effective.[10]

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[9] When States impose bond or bail requirements, "[t]he bond amount set must be reasonable given the particular situation of asylum-seekers, and should not be so high as to render bail systems merely theoretical." *2012 Detention Guidelines*, Annex A ¶ vi. "Systematically requiring asylum-seekers to pay a bond and/or to designate a guarantor/surety, with any failure to be able to do so resulting in detention (or its continuation), would suggest that the system is arbitrary and not tailored to individual circumstances." *Id.*

[10] As the Ninth Circuit recognized, the Department of Homeland Security has operated an alternatives-to-detention program since

B. Review by an Independent Decision-Maker Is Necessary To Ensure That Detention Is Not Arbitrary

Critically here, international law requires States to conduct independent review of the necessity, reasonableness, and proportionality of detention of asylum-seekers. The right to challenge one's detention "is a self-standing human right" that is "widely recognized in international and regional human rights instruments." *Basic Principles and Guidelines* ¶¶ 1–2. Under the ICCPR, "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." ICCPR art. 9, ¶ 4. The General Assembly has embraced the principle that a detained person "shall be entitled at any time to take proceedings . . . before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay." G.A. Res. 43/173, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 32 ¶ 1 (Dec. 9, 1988). Regional human rights instruments uniformly recognize this core human right. *See* U.N. Special Rapporteur on the Human Rights of Migrants, *2012 Report of the Special Rapporteur* ¶ 19,

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2004. Pet. App. 55a. According to a 2015 report of the Department's Inspector General, U.S. Immigration and Customs Enforcement has found that the program is "effective because, using its performance metrics, few program participants abscond." U.S. Department of Homeland Security, Office of the Inspector General, OIG-15-22, *U.S. Immigration and Custom Enforcement's Alternatives to Detention (Revised)* 2 (Feb. 4, 2015). The record in this case confirms that finding. *See* Resps.' Br. 40.

U.N. Doc. A/HRC/20/24 (Apr. 2, 2012) [hereinafter "*2012 Report of the Special Rapporteur*"].

The U.N. Human Rights Committee has affirmed that this principle applies to asylum-seekers. *See* UN-HRC General Comment No. 35 ¶ 18. Under international law, an asylum-seeker has the right "to be brought promptly before a judicial or other independent authority to have the detention decision reviewed" for necessity, reasonableness, and proportionality. *2012 Detention Guidelines* ¶ 47(iii), (v). "The reviewing body must be independent of the initial detaining authority, and possess the power to order release or to vary any conditions of release." *Id.* ¶ 47(iii); *see also Shams* v. *Australia*, U.N.H.-R.C., U.N. Doc. CCPR/C/90/D/1255, ¶ 7.3 (Sept. 11, 2007) (holding that a court's review of detention must include an assessment of whether detention violates the international law prohibition on arbitrary detention and must include the possibility of release); *Basic Principles and Guidelines*, Annex ¶ 42. As discussed in more detail below, independent review of detention must occur automatically; although the right to seek habeas relief must be respected, the availability of such relief does not adequately safeguard asylum-seekers' fundamental right to avoid arbitrary detention. *See infra* Parts III.A, III.B.

International jurisprudence and practice support the right to independent review of the decision to detain. The European Court of Human Rights has repeatedly found that detention of asylum-seekers without providing access to speedy and effective judicial review violates the right to liberty under article 5 of the European Convention on Human Rights. *See Suso Musa* v. *Malta*, Eur. Ct. H.R., App. No. 42337/12, ¶ 60 (2013); *Abdolkhani* v. *Turkey*, Eur. Ct. H.R., App. No. 30471/08, ¶ 142 (2009). The Inter-American Court of Human Rights has reached the same

conclusion with respect to migrants generally. *See Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Inter-Am. Ct. H.R. Advisory Op. OC-21/14, ¶¶ 191–198 (Aug. 13, 2014) (stating that detained migrants "must be brought promptly before a judge or other official authorized [by] law to exercise judicial functions"); *Dorzema* v. *Dominican Rep.*, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶ 140 (Oct. 24, 2012) (stating that the "authority that must decide the legality of the arrest or detention must be a judge or court" (internal quotation marks omitted)). And the practice of other States is to provide asylum-seekers the right to independent review of the legality of detention. *See, e.g.*, E.U. Directive art. 9, ¶ 3 ("Where detention is ordered by administrative authorities, Member States shall provide for a speedy judicial review of the lawfulness of detention . . . ."); Immigration Act 2009 No. 51, §§ 313, 316 (Nov. 16, 2009) (May 6, 2016 reprint) (N.Z.); Federal Act on Foreign Nationals, Dec. 16, 2005, art. 80 (amended) (Switz.).

Failure to provide independent review of the legality of detention produces unacceptable risks of prolonged, arbitrary detention of persons entitled to protection as refugees. In this case, for instance, the court of appeals found that "[c]lass members spend, on average, 404 days in immigration detention," and that "[n]early half are detained for more than one year, one in five for more than eighteen months, and one in ten for more than two years." Pet. App. 18a–19a. During this time, they are "treated much like criminals serving time," even though many class members have no criminal records and the class members with previous criminal convictions have already served their sentenced terms of imprisonment. *Id.* at 20a. Perversely, "[n]on-citizens who vigorously pursue claims for relief from removal," such as asylum-seekers, "face

substantially longer detention periods than those who concede removability." *Id.* at 19a. As one example, in *Nadarajah* v. *Gonzales*, 443 F.3d 1069 (9th Cir. 2006), an asylum-seeker was detained under Section 1225(b) for more than four years while twice defending the Government's appeal of the immigration judge's grant of asylum. Absent review by an independent decision-maker, detention threatens to punish asylum-seekers for pursuing their claims, in contravention of Article 31 of the *1951 Convention*.

C. International Law Precludes the Notion That Asylum-Seekers Detained at the Border Have Fewer Rights than Asylum-Seekers Detained After Entry

International law does not countenance the fiction, advanced by the Government here, that asylum-seekers detained at the border have fewer rights than persons detained after entry into the United States. *See* Petrs.' Br. 19–20. The Government largely bases this argument on this Court's decision in *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953). *Mezei*, however, did not involve a refugee or asylum-seeker and was decided before the United States bound itself to the *1967 Protocol* and the ICCPR. It therefore does not govern the legality of detention of asylum-seekers detained at the border.

It is a fundamental tenet of human rights law that the liberty of *all* persons, regardless of status, must be protected: the ICCPR provides that the right to avoid arbitrary detention applies to "all individuals within [a State's] territory and subject to its jurisdiction." ICCPR art. 2, ¶ 1; *id.* art. 9; *see also* UDHR art. 9 ("No one shall be subjected to arbitrary arrest, detention or exile."); *2012 Detention Guidelines* ¶ 12. As Justice Kennedy has recognized, "[i]nternational views on detention of refugees and

asylum seekers" support the conclusion that "*both* removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious." *Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting) (emphasis added).

The obligation to protect against arbitrary detention applies with full force with respect to asylum-seekers detained at the border under 8 U.S.C. § 1225(b). According to the Government, the purpose of detaining persons under Section 1225(b) is "to ensure that the border actually keeps people out." Petrs.' Br. 21–22. The Government paints the Section 1225(b) subclass members as economic migrants who have come to the United States to take American jobs. *See id.* at 23. The reality is far different. As discussed above, the "overwhelming majority" of the Section 1225(b) subclass in this case are asylum-seekers who have previously established a credible fear of persecution—a large majority of whom ultimately were granted relief. *See supra* p.12. International law prohibits the United States from detaining these individuals for the purpose of ensuring "that the border actually keeps [such individuals] out." Petrs.' Br. 21–22. As discussed above, "[d]etention that is imposed in order to deter future asylum-seekers . . . is inconsistent with international norms." *2012 Detention Guidelines* ¶ 32.

UNHCR understands that governments often "know very little" about persons arriving at the border. Petrs.' Br. 23. Under international law, "[m]inimal periods in detention may be permissible to carry out initial identity and security checks in cases where identity is undetermined or in dispute, or there are indications of security risks." *2012 Detention Guidelines* ¶ 24; *see also* UNHRC General Comment No. 35 ¶ 18; *F.K.A.G.* v. *Australia*, U.N.H.R.C., U.N. Doc. CCPR/C/108/D/2094/2011, ¶ 9.3 (Aug. 20, 2013). The need to establish identity or conduct security

checks, however, does not justify the periods of prolonged detention at issue in this case. To avoid characterization of detention as arbitrary, "detention should not continue beyond the period for which a State party can provide appropriate justification." *Bakhtiyari* v. *Australia*, U.N.H.R.C., U.N. Doc. CCPR/C/79/D/1069/2002, ¶¶ 9.2, 9.3 (Nov. 6, 2003); *see also 2012 Detention Guidelines* ¶ 24.

Fundamentally, all asylum-seekers are entitled to independent review of the legality of their detention, "[r]egardless of the name given to a particular place of detention." *2012 Detention Guidelines* ¶ 7; *see also* ICCPR art. 9, ¶ 4 ("Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court . . . ."). The European Court of Human Rights recognized this principle in holding that France was required to provide asylum-seekers with judicial review of their detention in the arrivals area of Paris-Orly Airport. *See Amuur* v. *France*, Eur. Ct. H.R., App. No. 19776/92, ¶¶ 52–54 (1996); *see also Riad* v. *Belgium*, Eur. Ct. H.R., App. Nos. 29787/03, 29810/03, ¶ 68 (2008).[11] Under international law, asylum-seekers detained at the U.S. border are entitled to review of their detention by an independent decision-maker.

III. The Procedural Aspects of the Court of Appeals' Ruling Are Consistent with International Law Governing Detention of Asylum-Seekers

The *2012 Detention Guidelines* provide support for the procedural safeguards required by the court of appeals. "Decisions to detain or to extend detention must be

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[11] France was later deemed to be in compliance with the protections required by *Amuur* because, under subsequently enacted French law, "detention [of persons detained at the border] beyond four and twelve days requires judicial authorisation." Council of Europe, Committee of Ministers, Res. No. DH (98) 307 (June 25, 1996).

subject to minimum procedural safeguards." *2012 Detention Guidelines* 27 (Guideline 7). Although states may employ different models for providing review, the right to challenge the arbitrariness of detention should be guaranteed in law and practice. *Basic Principles and Guidelines* ¶ 13. The procedures required by international law include those at issue in this case: (1) the requirement that the State bear the burden to demonstrate the lawfulness of detention; (2) the automatic provision of periodic bond hearings; and (3) the requirement that immigration judges consider the accrued length of detention in deciding whether to release an individual. *See* Pet. App. 52a–53a, 56a–58a. Absent such protections, detention of refugees is arbitrary under international law.

A. The Government Must Bear the Burden of Demonstrating the Lawfulness of Detention

As a matter of international law, the burden to justify detention of an asylum-seeker must fall on the Government. As already discussed, "detention of asylum-seekers should be a measure of last resort, with liberty being the default position." *2012 Detention Guidelines* ¶ 14; *see supra* p.16. Because liberty is the default, the burden of establishing the lawfulness of the detention rests solely with the Government. *See* UNHRC General Comment No. 35 ¶ 15 (construing States' obligations under article 9 of the ICCPR); *2012 Detention Guidelines* ¶¶ 14, 47(v). "[T]he authorities need to establish that there is a legal basis for the detention in question, that the detention is justified according to the principles of necessity, reasonableness and proportionality, and that other, less intrusive means of achieving the same objectives have been considered in the individual case." *2012 Detention Guidelines* ¶ 47(v); *see also Basic Principles and Guidelines*, Annex ¶ 21.

Requiring an asylum-seeker to prove his or her entitlement to release from detention violates these well-established principles.

Because the Government must bear the burden to justify detention, the Government necessarily bears the burden to initiate independent review of an asylum-seeker's detention. Although asylum-seekers must be able "to challenge the lawfulness of detention before a court of law at any time" (for example, through habeas proceedings), the ability to seek such relief is not an adequate substitute for a State's obligation to provide independent review. *See 2012 Detention Guidelines* ¶ 47(v); *Basic Principles and Guidelines*, Annex ¶ 65; *see also* Petrs.' Br. 49–50. Requiring the asylum-seeker to file a habeas petition to obtain review of his or her detention would eviscerate the principle that the State bears the burden to justify the legality of detention. Additionally, as discussed below, detained asylum-seekers often lack access to counsel and/or information about their legal rights, *see infra* Part IV; requiring such individuals to initiate habeas proceedings will inevitably stymie review of the detention of asylum-seekers in many cases. *See 2012 Report of the Special Rapporteur* ¶ 23.

B. Detention Must Be Reviewed Periodically

Requiring periodic bond hearings also comports with international law. After an initial hearing, "regular periodic reviews of the necessity for the continuation of detention before a court or an independent body must be in place." *2012 Detention Guidelines* ¶ 47(iv); *see also 2012 Report of the Special Rapporteur* ¶ 21 (stating that "the decision to keep the person detained must be reviewed periodically"); *Global Roundtable* ¶ 2 (requiring that detention of asylum-seekers be subject to "periodic and judicial review"); *Ahani* v. *Canada*, U.N.H.R.C., U.N. Doc.

CCPR/C/80/D/1051/2002, ¶ 10.2 (June 15, 2004) ("[A]n individual must have appropriate access . . . [to] sufficiently frequent review."); E.U. Directive art. 9, ¶ 5 ("Detention shall be reviewed by a judicial authority at reasonable intervals of time . . . ."). Periodic review is necessary to ensure that, in light of changing circumstances, continuing detention is still justified. *Basic Principles and Guidelines*, Annex ¶ 62; *see, e.g.*, *A* v. *Australia*, U.N.H.R.C., ¶ 9.4 ("[E]very decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed.").

Just as the availability of habeas relief does not negate the State's initial obligation to provide independent review, *see supra* Part III.A, it also cannot relieve a State of its obligation to provide regular, periodic reviews. *See 2012 Detention Guidelines* ¶ 47(v); *Basic Principles and Guidelines*, Annex ¶ 65. Periodic review of detention should be conducted automatically. *See 2012 Detention Guidelines* ¶ 47(iv) (requiring "regular periodic reviews"); *2012 Report of the Special Rapporteur* ¶ 23 ("[T]here should be automatic, regular and judicial, not only administrative, review of detention in each individual case . . . .").

In UNHCR's view, good practice is to conduct an initial review within 24 to 48 hours, periodic reviews every 7 days thereafter, and, after one month of detention, periodic reviews every month thereafter until "the maximum period set by law is reached." *2012 Detention Guidelines* ¶ 47(iii), (iv). Other countries require periodic review of the detention of asylum-seekers on comparable timetables. For example, Canada requires review of detention in most cases within 48 hours, again within 7 days thereafter, and then at regular 30-day intervals; such review occurs before an independent administrative tribunal, and

the detained individual has the right to seek judicial review. *See* Immigration and Refugee Protection Act, S.C. 2001, c. 27 §§ 54, 57, 72 (as amended July 1, 2015) (Can.). New Zealand requires judicial review of detention after 96 hours, and in most cases periodic review every 28 days thereafter. *See* Immigration Act 2009 No. 51, §§ 313, 316 (Nov. 16, 2009) (May 6, 2016 reprint) (N.Z.). These timeframes are, of course, far shorter than those at issue in this case.

C. Judges Must Consider the Accrued Length of Detention in Favor of Granting Release

Requiring immigration judges to consider the accrued length of detention is consistent with the international law principle of proportionality. The length of detention is an obvious factor in determining whether detention is proportionate and therefore legitimate. The Government itself concedes this point, stating that, "because longer detention imposes a greater imposition on an individual, as the passage of time increases a court may scrutinize the fit between the means and the ends more closely," Petrs.' Br. 47 (citing *Zadvydas*, 533 U.S. at 690, 701). The *2012 Detention Guidelines* expressly provide that "[t]he length of detention can render an otherwise lawful decision to detain disproportionate and, therefore, arbitrary." *2012 Detention Guidelines* ¶ 44. Accordingly, a decision-maker must always take into account the length of an asylum-seeker's detention in balancing "the importance of respecting the rights to liberty and security of person and freedom of movement, and the public policy objectives of limiting or denying these rights." *Id.* ¶ 34. The longer detention persists, the more likely it is to be arbitrary.

Under no circumstance may the length of detention continue indefinitely. "Indefinite detention for immigration purposes is arbitrary as a matter of international human rights law." *2012 Detention Guidelines* ¶ 44; *see also* WGAD, Deliberation No. 5 on Situation Regarding Immigrants and Asylum Seekers, Principle 7, U.N. Doc. E/CN.4/2000/4 (Dec. 28, 1999); *2012 Report of the Special Rapporteur* ¶ 22; *F.K.A.G.* v. *Australia*, U.N.H.R.C., ¶ 9.4 (holding that detention was arbitrary because asylum-seekers were "deprived of legal safeguards allowing them to challenge their indefinite detention"). This principle further requires that reviewing authorities consider the length of detention in determining whether continued detention is justified.

IV. Prolonged Detention Impedes Access to Asylum and Can Lead to *Refoulement*

As a practical matter, prolonged detention of asylum-seekers absent meaningful review can undermine a State's compliance with basic principles of refugee law.

A. Prolonged Detention Impedes Adjudication of Refugee Claims

The requirement that States provide "fair and efficient procedures for the determination of refugee status" is central to the *1951 Convention* and *1967 Protocol*. UNHCR Exec. Comm., *General Conclusion on International Protection*, No. 71 (XLIV), U.N. Doc. A/48/12/Add.1 (Oct. 8, 1993) [hereinafter "UNHCR Conclusion No. 71"]. Detention can impede full, fair adjudication of valid claims by creating obstacles to obtaining legal counsel. *See* Pet. App. 20a; *see also Global Roundtable* ¶ 8. Detained asylum-seekers are less likely to secure legal representation, in part because they are oftentimes

detained in remote locations. Charles H. Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices* (Dec. 2004), *in* U.S. Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal*, Vol. II, 232, 239–40 (2005); Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison* 44 (2009). And asylum-seekers without legal representation are far less likely to be granted asylum. *See* U.S. Gov't Accountability Office, GAO-08-940, *U.S. Asylum System: Significant Variation Existed in Asylum Outcomes Across Immigration Courts and Judges* 30 (2008). In addition, detention makes it difficult for asylum-seekers to collect evidence and reference materials, such as country condition reports, in support of their claims. Detention thus diminishes the likelihood that asylum-seekers will be successful in obtaining asylum.

B. Detention Risks *Refoulement*

Prolonged detention further raises concerns about States' compliance with the international law obligation to safeguard the principle of *non-refoulement*. As discussed above, *non-refoulement* is the obligation not to return an individual to any country where he or she faces persecution or a reasonable possibility of serious harm. *See supra* p.6. The *non-refoulement* obligation is at the core of the *1951 Convention* and *1967 Protocol* and, in UNHCR's considered view, "has become a norm of customary international law." UNHCR, *Note on the Principle of Non-Refoulement* (Nov. 1997).

UNHCR's Executive Committee has recognized that unjustified detention seriously jeopardizes the protection of refugees. UNHCR Conclusion No. 71; *see also* UNHCR Conclusion No. 44 (reaffirming "the fundamental

importance of the observance of the principle of non-refoulement" and expressing concern about the large numbers of asylum-seekers subject to detention). As the court of appeals correctly recognized, prolonged detention may result in asylum-seekers abandoning bona fide claims and returning to countries where they fear persecution or torture. *See* Pet. App. 19a. Detention can be especially traumatic for victims of persecution. As a result, some asylum-seekers decide to withdraw their applications and accept deportation, rather than endure lengthy periods of detention while they pursue their claims. *See, e.g.*, Craig Haney, *Conditions of Confinement for Detained Asylum Seekers Subject to Expedited Removal* (Feb. 2005), *in* U.S. Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal*, Vol. II, 178, 197–98 (2005); Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison* 45–46 (2009). Prolonged detention thus increases the chances of *refoulement* for asylum-seekers.

Finally, it bears highlighting that detention of asylum-seekers who declare themselves to authorities at the border worsens an already precarious humanitarian crisis by driving asylum-seekers into the hands of smugglers and human traffickers. As UNHCR has stated:

> In our dialogue with Governments . . . , security concerns often seem to trump humanitarian and protection considerations, but they are not mutually exclusive. We have seen time and again how giving primacy to a security focus at the expense of protection has failed to bring about the desired results, often at great expense to taxpayers. Push-backs, building walls, increasing detention, and further restricting access, combined with few legal avenues to safety, will never be the answer. The

> impact is simply the diversion of refugee movements along other routes and the aggravation of already precarious situations in regions embroiled in conflict. Worse still, these measures compel more people who have nothing left to lose to risk dangerous journeys in the hope of finding eventual safety and stability. This creates an environment in which smuggling and trafficking can thrive.

UNHCR, 66th Sess. of the Exec. Comm. of the High Comm'r's Programme Agenda point 5(a) (Oct. 8, 2015) (statement by Volker Türk, Asst. High Comm'r for Protection).

CONCLUSION

For the foregoing reasons, UNHCR respectfully urges this Court to construe the Immigration and Nationality Act in accordance with the United States' international law obligations to protect asylum-seekers from arbitrary detention.

Respectfully submitted.

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